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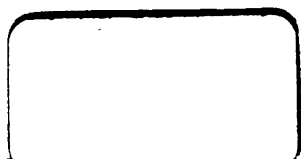
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JSN
JAG
AOQ
v.1

REPORTS OF CASES

ARGUED AND DETERMINED

IN *1841's*
St. Br.
The Court of Queen's Bench,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

EASTER, TRINITY, AND MICHAELMAS TERMS,

1841.

BY

CHARLES JAMES GALE, ESQ.

AND

HENRY DAVISON, ESQ.

OF THE INNER TEMPLE, BARRISTERS AT LAW.

VOL. I.

WITH

AN INDEX OF THE PRINCIPAL MATTERS.

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J U D G E S
OF
THE COURT OF QUEEN'S BENCH,
During the period comprised in this volume.

The Right Hon. THOMAS LORD DENMAN, C. J.

The Hon. Sir JOHN PATTESON, Knt.

The Hon. Sir JOHN WILLIAMS, Knt.

The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

The Hon. Sir WILLIAM WIGHTMAN, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

Sir THOMAS WILDE, Knt.

SOLICITOR-GENERAL.

Sir THOMAS WILDE, Knt.

Sir WILLIAM WEBB FOLLETT, Knt.

MEMORANDA.

EARLY in Trinity Vacation, Sir JOHN CAMPBELL, Knight, Attorney-General, was appointed Lord High Chancellor of Ireland, by the title of Baron CAMPBELL, of St. Andrew's, in the county of Fife.

Sir THOMAS WILDE, Knight, Solicitor-General, succeeded Sir JOHN CAMPBELL as Attorney-General.

At a later period of the Vacation Lord Chancellor COTTENHAM resigned the Great Seal, which was delivered to Lord LYNDHURST as Lord Chancellor.

Lord CAMPBELL resigned the office of Lord Chancellor of Ireland, and was succeeded by Sir EDWARD BURTENSHAW SUGDEN, Knight.

Sir FREDERICK POLLOCK, Knight, was appointed Attorney-General.

Sir WILLIAM WEBB FOLLETT, Knight, was appointed Solicitor-General.

Early in the same Vacation WILLIAM WHATELEY, of the Inner Temple, Esq.; RICHARD GODSON, of Lincoln's Inn, Esq.; SUTTON SHARPE, of the Middle Temple, Esq.; CHARLES JAMES KNOWLES, of the Middle Temple, Esq.; MATTHEW TALBOT BAINES, of the Inner Temple, Esq.; and the Hon. JAMES STUART WORTLEY, of the Inner Temple—were appointed Queen's Counsel; and CHARLES AUSTIN, of the Middle Temple, Esq., received a patent of precedence, to rank next after Mr. BAINES.

Later in the Vacation ALEXANDER JAMES EDMUND COCKBURN, of the Middle Temple, Esq., was appointed Queen's Counsel.

And JOHN VINCENT THOMPSON, of Lincoln's Inn, Esq., was made Serjeant, and gave rings with the motto, "Nec ultra, nec citrà."

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b

ERRATUM IN 3 P. & D. 528.

Lord DENMAN C. J., in *Baylis v. Laurence*, is erroneously reported as having said that "the question of *intention*, in a case of libel, never can be one for the jury,"—whereas his lordship, in substance, stated the contrary.

ERRATA IN THIS VOLUME.

- Page 37, line 17 from top, *for* "in," *read* "or."
42, line 1 from top, *for* "demurrer," *read* "plea."
119, line 4 from top, *dele* "of."
119, line 13 from top, *dele* "as in."
125, line 3 of argument, *for* "costs attendant," *read* "costs were attendant."
150, *for* "Rule absolute," *read* "Judgment for the defendants."
191, in the marginal note to *Reg. v. Lydeard St. Laurence*, *for* "made as a ground," *read* "stated as a ground."
208, line 18 from top, *for* "tenant," *read* "tenement."
211, column 2, lines 18 and 19 from top, *for* "eum altitudinum," *read* "eam altitudinem;" and line 23, *for* "eum," *read* "eam."
245, in the marginal note to *Reg. v. Clint*, *for* "as the ground of a material variance," *read* "on the ground," &c.
400, line 13 from the top, *dele* "also."
442, in the marginal note to *Reg. v. Holdsworth*, *after* "Held," *dele* "that."
533, line 2 from the bottom, *for* "could not the other claim," *read* "could he not claim for the other;" and in last line, *dele* "not."
537, in the marginal note to *Reg. v. Chancellor of Oxford*, *after* "party," *read* "not a member of the university."

CASES

ARGUED AND DETERMINED

IN THE

COURT OF QUEEN'S BENCH

IN

EASTER TERM,

IN

THE FOURTH YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,
Lord DENMAN C. J. WILLIAMS J.
PATTESON J. WIGHTMAN J.

In the Bail Court,
COLERIDGE J.

MARTINDALE v. SMITH.

1841.

Thursday,
April 15th.

TROVER for six stacks of oats. Pleas: first, not guilty; second, that the plaintiff was not possessed of the oats as of his own property. At the trial before *Alderson* B. at the spring assizes, 1839, for the county of Cumberland, it was in evidence that the plaintiff, on the 23rd April, 1838, agreed to purchase six oat stacks of the defendant, and the following written agreement, bearing date on that day, was signed by the parties:—

"Sold to Mr. *John Martindale* six oat stacks, for eighty-five pounds. *John Smith* gives *John Martindale* liberty to let the stacks stand, if he thinks fit, until the middle of August next; and *John Martindale* to pay *John Smith* for the stacks in twelve weeks from the date hereof."

The plaintiff did not pay or tender payment of the purchase money to the defendant within the twelve weeks.

vendor cannot rescind the contract on non-payment at the day.

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Before the expiration of the credit the defendant told the plaintiff that if he did not pay the purchase money on the Monday, the 16th July, which was the last day of the twelve weeks, he should not have the oats. Two days after the expiration of the twelve weeks, the plaintiff tendered the purchase money to the defendant, and offered to pay interest for the intervening time ; but the defendant refused to accept the money, and then and immediately before the tender he asserted his right to deal as he pleased with the oats, and refused to give possession of them to the plaintiff. A formal demand and refusal were also proved. On the 31st July the defendant gave the plaintiff a written notice that, he having failed in performing his part of the contract, the defendant considered the contract at an end, and meant to keep or dispose of the stacks as he thought proper. The defendant subsequently sold and delivered the oats to another party. Upon this evidence the learned judge directed a verdict to be given for the plaintiff, reserving leave to move to enter a verdict for the defendant on the second issue. In the Easter term following a rule was obtained accordingly ; against which

Alexander and Knowles shewed cause (a). It cannot be disputed that by this contract the property in the oats, which must be treated as a specific chattel, passed immediately to the plaintiff: *Tarling v. Baxter* (b). If any injury had happened to them, the plaintiff must have borne the loss ; and the only consequence of the non-payment could be to give the vendor a lien, which would be determined by the tender: *Bloxam v. Sanders* (c), *Dixon v. Yates* (d). The case of *Langford v. Tiler* (e) was a sale of goods not upon credit, and there it was held that the

(a) In Hil. T. last, March 18.

(d) 5 B. & Ad. 313; S.C. 2 N.

(b) 6 B. & C. 360; S.C. 9 D.

& M. 177.

& R. 272.

(e) 6 Mod. 163; S.C. 1 Salk.

(c) 4 B. & C. 941; S.C. 7 D.

113.

& R. 896.

contract was determined by the neglect of the vendee to pay, after a request by the vendor to him to take them away within a reasonable time: but in *Greaves v. Ashlin* (a), Lord *Ellenborough* held that the vendee's neglect to take away goods within a reasonable time did not entitle the vendor to put an end to the contract, though it might make him liable to pay warehouse room, or to an action for not removing them, should the vendor be prejudiced by the delay. In *Wilmshurst v. Bowker* (b) the contract of sale was conditional upon the delivery by the vendee to the vendor of the draft upon a banker; and, that not having been done, it was held that the former was not in a condition to maintain trover, he never having had the right of possession; but the Court of Common Pleas appear to have been of opinion that he might have maintained a special action upon the case for any damage sustained by him in consequence of a resale by the vendor. *Coslake v. Till* (c) has been cited to prove that the time stipulated in such an agreement as this is of the essence of the contract; but that was an agreement for the purchase of stock in trade, fluctuating in amount; and Lord *Gifford* decided the case expressly on the ground, that, "where the subject-matter which is to be bought and sold is in its very nature exposed to daily variations, time must necessarily form a very material ingredient in the contract."

According to the terms of this contract, the failure to observe a condition by the one party does not entitle the other to rescind the contract, which could not be but by consent or on the ground of fraud: *Gompertz v. Denton* (d). There was no evidence to shew that it was any part of the original agreement, or that before the day of payment it was agreed by the parties, that on a failure of payment the vendor should be at liberty to rescind the contract; nor indeed could such evidence be admitted, for that would be

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(a) 3 Camp. 426.

(c) 1 Ross. 376.

(b) 5 Bing. N. C. 541; S. C. 7

(d) 1 C. & M. 207.

Scott, 561.

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to vary a contract, required by the Statute of Frauds to be in writing, by parol: *Greaves v. Ashlin* (a), *Goss v. Lord Nugent* (b).

Cresswell (with whom were *Dundas* and *Ramshay*), in support of the rule. The question, in whom was the property in the oats, is not material in this case. The real question is whether, at the time the action was brought, the plaintiff had the right of possession. The plaintiff had not the right of possession; for, having broken the contract himself in a material part, he has no *locus standi* in court to complain of any subsequent breach of contract by the defendant.

In addition to this objection to the plaintiff's right to recover, the authorities shew that the defendant, upon the failure of the plaintiff to perform his part of the contract, had a right to rescind it. Here the whole consideration for the defendant's contract failed. The failure of performance by the plaintiff, and the positive assent of the defendant to a rescinding, are equivalent to an agreement by both parties to rescind, though one party alone could not rescind; *Hunt v. Silk* (c).

The time was of the essence of the contract. The case of *Wilde v. Fort* (d) decided that, "if the vendor of an estate by auction does not shew a clear title by the day specified, the purchaser may recover back his deposit and rescind the contract, without waiting to see whether the vendor may ultimately be able to establish a good title or not." Sir *E. Sugden* (e) speaks of the rule of law as clear, that "the time fixed is, at law, of the essence of the contract;" and, after remarking upon the relaxation of this rule which exists in courts of equity in suits for specific performance, he observes that it is perhaps a subject of regret that equity

(a) 3 Campb. 426.

(d) 4 Taunt. 334.

(b) 5 B. & Adol. 58; 2 N. & M.
 28.

(e) Vend. & Purch. 10th edit.
 402.

(c) 5 East, 449.

should have assumed a power of dispensing with the literal observance of the rule. In *Hagedon v. Laing* (a) it was held that the limitation of time for payment was by way of indulgence to the vendee, and, though not called upon to decide the point, the Court appear to have been strongly of opinion that, after the day, the vendee, who had made default in payment, had lost all interest in the subject of the contract.

There was an attempt at the trial to prove a parol dispensation, by the defendant, with the observance by the plaintiff of the period of payment; but such a fact, if proved, clearly would have been inoperative: *Stead v. Dawber* (b), *Marshall v. Lynn* (c). *Stead v. Dawber* (b) is an authority for the position that in such a contract as this, time is of the essence of the contract.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—The plaintiff had purchased of the defendant six stacks of oats for 85*l.*, to be paid for at the end of twelve weeks. By the contract defendant had given plaintiff liberty to let them stand on his premises, where they remained till defendant gave plaintiff notice, that unless they were paid for within the twelve weeks he should not have them. Plaintiff demanded them and tendered the price, but after the stipulated time. Defendant refused to give them up, and converted them to his own use.

Plaintiff brought this action of trover for them. The pleas were not guilty, and that plaintiff was not possessed of the stacks as his own property, when the case appeared to be as above stated.

Having taken time to consider of our judgment, owing to the doubt excited by a most ingenious argument, whether the vendor had not a right to treat the sale as at an end, and reinvest the property in himself, by reason of the vendee's failure to pay the price at the appointed time, we are clearly of opinion that he had no such right, and that the action is

(a) 1 Marsh. 514.

(c) 6 M. & W. 109.

(b) 2 P. & D. 417.

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well brought against him. For the sale of a specific chattel on credit, though that credit may be limited to a definite period, transfers the property in the goods to the vendee, giving the vendor a right of action for the price, and a lien upon the goods, if they remain in his possession, until that price be paid; but that default of payment does not rescind the contract. Such is the doctrine cited by *Holroyd J.*, from *Com. Dig. tit. Agreement*, in *Tarling v. Baxter* (a); and it will be found consistent with all the numerous cases referred to in the course of the argument. In a sale of chattels, time is not of the essence of the contract, unless it is made so by express agreement, than which nothing can be more easy by introducing conditional words into the bargain. The late case of *Stead v. Dawber* (b) does not apply, depending (as *Parke B.* truly observed in 6 *M. & W.* 109), not on the materiality of the alteration in the contract, but on the fact of alteration only.

Pothier, in his *Traité de Vente*, part 5, ch. 2, s. 6, cites the Civil Code for the proposition, that a purchaser's delay in paying the price does not give the vendor a right to require a dissolution of the contract: "he can only exact by legal procedure the payment of the price due to him. *Non ex eo quod emptor non satis conventioni fecit contractus constituitur irritus.*" He adds, however, that from the difficulty of enforcing payment from debtors, the French law had departed from the rigour of these principles, permitting a suit for the dissolution of the contract for default of payment. The judge then appointed a more distant day, which passed, and, no payment made, the vendor was permitted to resume possession of the thing sold, but, even after sentence of dissolution, the purchaser may prevent that effect and keep what he has bought by appealing, and offering, on that appeal, the price which he owes, with interest and expenses.

The vendor's right therefore to detain the thing sold against the purchaser, must be considered as a right of lien

(a) 6 B. & C. 360; S. C. 9 D. (b) 2 P. & D. 447.
 & R. 272.

till the price is paid, not a right to rescind the bargain, and here the lien was gone by tender of the price.

My brother *Alderson* directed the jury according to these principles, and the rule for setting aside the verdict must be discharged.

G.

Rule discharged.

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THE QUEEN v. The Inhabitants of MANSFIELD.

Wednesday,
April 28th.

ON appeal to the Nottinghamshire Quarter Sessions of April, 1840, against an order for the removal of *Ann Fletcher* and her two children from the parish of Mansfield in the said county, to the parish of Tewkesbury in Gloucestershire, the sessions confirmed the order as to the mother and discharged it as to the children, subject to the opinion of this Court upon a case.

The illegitimacy of a child is not to be inferred from the single fact that the mother cohabited notoriously with another man, unless some evidence is also given of the non-access of the husband.

The following is the material part of the case. *Ann Fletcher*, the pauper, was married to *Thomas Fletcher* in 1812. The paupers *Henry* and *Elizabeth* are her children.

T. Fletcher, the husband of *Ann Fletcher*, is still living.

A woman married in 1812 went through the form of marriage in 1818, living her husband, and cohabited with her paramour down to 1832:

The children removed by the order are the bastard children of *Ann* by *Henry Parsons*, and were christened by the names of *Henry* and *Elizabeth Parsons*, and have never gone by the name of *Fletcher* or any other name but that of *Parsons*. *Henry* is of the age of nineteen and upwards, and *Elizabeth* is of the age of seventeen and upwards.

— Held, that the Quarter Sessions in 1840, when her husband was still living, were not justified in finding, upon these facts alone, there being no evidence as to non-access,

The pauper *Ann* was married to *Parsons* by banns at Mansfield in 1818, and cohabited with him at Mansfield from 1818 to 1832, and during such time the paupers *Henry* and *Elizabeth* were born.

The settlement of *T. Fletcher*, the husband of the pauper, is at Tewkesbury.

The above facts were proved by *Ann*, the pauper, who was the only witness for the respondents. No evidence was given by the appellants.

that her child, who was then 19 years of age, was a bastard.

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If the Court shall be of opinion that the sessions were justified on the evidence before them in finding the facts above stated, then the order of sessions is to be confirmed, otherwise to be discharged.

N. R. Clarke and *Wildman* in support of the order of sessions. The question is whether the sessions were justified in coming to the conclusion that these children were illegitimate. The first resolution in the *Banbury Peerage* case (*a*) shews that the presumption of legitimacy, even where there have been opportunities of access, may be rebutted by circumstances inducing a contrary presumption. A fortiori, therefore, in the present case, where the only evidence was "of circumstances inducing a contrary presumption," there being nothing to indicate opportunities of access, the legitimacy might properly have been negatived. So in *Cope v. Cope* (*b*), where there was positive evidence that the husband used at intervals to visit his wife, *Alderson J.* observed, "If the husband and wife are living separate, and the wife is notoriously living in open adultery, although the husband have an opportunity of access, it would be monstrous to suppose that, under such circumstances, he would avail himself of such an opportunity. The legitimacy of a child born under such circumstances could therefore not be established." Here neither access nor opportunity of access were shewn; is then the mere circumstance that the husband was living conclusive in favour of legitimacy? If so, this absurdity must follow, that, if there is evidence of opportunity of access on the one hand as well as evidence of adultery on the other, a jury might decide between such conflicting evidence upon the point of legitimacy, but that, if there was no evidence whatever on the subject of access to weigh against the counter evidence furnished by the adultery, they would be bound to find in favour of legitimacy. In *Morris v. Davies* (*c*) there was evidence of access, yet the question of legitimacy was not dealt with as thereby

(*a*) 1 Sim. & St. 153.

(*c*) 3 C. & P. 215.

(*b*) 5 C. & P. 604

concluded in point of law, but was left to the jury, who found against the legitimacy, and the finding was supported, on appeal, by the House of Lords (a). *Rex v. Luffe* (b) and *Goodright v. Saul* (c) also were referred to.

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Whitehurst and *Willmore* contra were not heard.

LORD DENMAN C. J.—The question is whether there was any evidence of illegitimacy, to make out which there must be evidence of non-access. Non-access may, no doubt, be inferred from circumstances. But here the only fact proved was that the mother lived with a man in a state of adultery. We are not told where the husband was during the period of her adulterous intercourse. The case of *Cope v. Cope* (d), as reported in 5 C. & P. 604, and abstracted in *Harrison's Digest*, has been relied upon. Even in this report it does not appear to me that the learned judge was laying down a rule of law, but merely that he was making strong observations for the direction of the jury upon the circumstances of the particular case. I may remark, in passing, that a proposition is often taken from the summing up of a judge as a proposition of law, which has been addressed merely by way of observation to the jury. But in the report of *Cope v. Cope*, in 1 M. & Rob. 275, I find no such proposition as that which has been relied upon, but rather the contrary, for the learned judge says, "Where the wife is living in open and notorious adultery, and the husband on one single occasion only had opportunity of access to her, and then at a time and under circumstances rendering it extremely improbable that he availed himself of the opportunity, those facts might perhaps be urged as a reasonable ground for concluding that sexual intercourse did not take place." So that it seems the opinion of the jury must be taken upon the very question of non-access, notwithstanding the wife be living in adultery; the fact of non-access therefore is not to

(a) 5 Clark & F. 163.

(c) 4 T. R. 356.

(b) 8 East, 193.

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be assumed. There is nothing in the cases cited to shew that proof of non-access can be dispensed with.

PATTESON J.—On referring to *Cope v. Cope* I find it is no authority in support of the conclusion come to by the sessions, for all the learned judge said was that access was to be presumed, but whether it took place or not, under a particular state of circumstances, was for the consideration of the jury. The facts of this case are, that the woman was married in 1812, that her husband is living at this moment, that in 1818 she went through the ceremony of marriage with another man notwithstanding, lived with him and had children. We are asked from these facts to say there was non-access, although her husband might be living next door to her.

WILLIAMS J. concurred.

D.

Order of Sessions quashed.

Wednesday,
April 21st.


PACKER v. GIBBINS.

An upper floor of a house was occupied at a rent payable quarterly. During the currency of a quarter the house was burnt and rendered uninhabitable. In an action for use and occupation, the plaintiff having recovered for the occupation up to the time of the fire from the quarter-day preceding:—Held, that he was entitled to recover for that period at least.

ASSUMPSIT for use and occupation “of rooms and apartments.” Plea: non assumpsit. The issue joined was tried before the under-sheriff of Middlesex.

It appeared from the notes of the under-sheriff, and from an affidavit made by the clerk to the defendant's attorney of the facts proved at the trial, that the defendant had been tenant to the plaintiff of the second floor in his house, and that the rent was payable quarterly. It did not otherwise appear that there was any express demise, nor was any stipulation of a fixed rent proved, but the plaintiff gave evidence of the value of the premises. The house was burnt down during the currency of a quarter, and the defendant then ceased to occupy it in fact, but it did not appear that the

exterior walls were destroyed by the fire. It was objected, on behalf of the defendant, that the facts proved shewed an express demise of premises at a rent payable quarterly, that there could be no apportionment in this case, and that therefore the plaintiff was not entitled to recover anything in respect of the period of occupation intervening between the time of the fire and the preceding quarter day. The under-sheriff overruled the objection, and the plaintiff had a verdict for 2*l.* 13*s.* for the use and occupation of the apartments during that time.

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Lush now renewed the objection on a motion for a new trial (*a*). The form of the action is assumpsit for use and occupation, but the plaintiff is not entitled to recover, there being an express demise, unless he be entitled to do so according to the demise (*b*). The plaintiff had no right to recover upon this demise, for by the destruction of the subject of the demise either the relation of landlord and tenant was entirely determined, or the rent was suspended. "A rent service is something given by way of retribution to the lessor for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this, that the land demised is enjoyed by the tenant during the term included in the contract, for a tenant can make no return for a thing he has not; if, therefore, the tenant be deprived of the thing letten, the obligation to pay ceases, because such obligation has its force only from the consideration, which was the enjoyment of the thing demised (*c*)."
 There can be no apportionment in this case as to time. "And there shall never be an apportionment in respect of part of the time, as there shall be upon an eviction of part of the land;" *Clun's case*, 10 *Co.* 128, *Bac. Abr. Rent*, (L); though in a similar case of destruction of part of the subject of the demise, there might be an apportion-

(*a*) Before Lord Denman C. J., & C. 332; S C. 8 D. & R. 67;
Patteson, Williams and Coleridge Slack v. Sharpe, 3 N. & P. 390.
Js. (c) Gilb. on Rents, 145; *Bac.*

(*b*) Vide *Hall v. Burgess*, 5 B. Abr. Rent, (L).

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ment as to that (a). "And here it seems extremely reasonable, that if the use of the thing be entirely lost or taken away from the tenant, the rent ought to be abated or proportioned, because the title to the rent is founded upon this presumption, that the tenant enjoys the thing during the contract; and, therefore, if part of the land be surrounded or covered with the sea, this being the act of God, the tenant shall not suffer by it, because the tenant, without his default, wants the enjoyment of part of the thing which was the consideration of his paying the rent (b)." In *Baker v. Holtzaffel* (c) there was a demise of land with the house which had been destroyed by fire, the rent therefore would be considered to issue out of the lands. *Izon v. Gorton* (d) is not warranted by the authorities on which it professes to be founded, and there the premises were rebuilt, and the tenant had notice that they had been so rebuilt. [*Patteson J.* The defendant is in this dilemma, that, if there is an express demise, he is liable for the rent, notwithstanding the fire (e), if there is not, he is liable for the period during which the premises were actually occupied (f).]

*Cur. adv. vult.*

April 23.

Lord DENMAN C. J.—In an action for use and occupation, the rent is considered as accruing due de die in diem,

(a) Bac. Abr. Rent, (M).

(b) Bac. Abr. Rent, (M 2); 1 Rol. Abr. Apportionment, (C), 236; Act de Dieu.

(c) 4 Taunt. 45.

(d) 5 Bing. N. C. 501; S. C. 7 Scott, 537.

(e) Per *Curiam*, in *Izon v. Gorton*, (5 Bing. N. C. 501; 7 Scott, 537,) "The case of *Baker v. Holtzaffel*, 4 Taunt. 45, is a direct authority, that a tenancy for a term under an agreement, not being an instrument under seal, is not determined by a fire during the continuance of the tenancy. A tenancy from year to year, until it

is determined by a notice to quit, is as to its legal character and consequences the same as a term for years."

(f) In *Izon v. Gorton* it was held, on a similar destruction of a floor by fire, that notwithstanding such destruction, inasmuch as the space inclosed by the four walls remained, and, on the event of the landlord rebuilding, the tenant would have a right to re-enter, the obligation must be reciprocal, and he therefore liable to the rent after the fire, in an action for use and occupation.

there is therefore no objection to the plaintiff's right to recover in this instance, for the occupation up to the time of the fire taking place.

G.

Rule refused.

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MORRIS v. JONES and others.

Thursday,  
April 15th.

**ASSUMPSIT.** The declaration contained the common counts to recover the price of work, labour and materials, of goods sold and delivered, and of money due on an account stated, alleging the plaintiff's damage to be 50*l.* The plaintiff pleaded non assumpsit and a tender. The particulars of the plaintiff's demand were in the following form:

" This action is brought to recover the sum of 27*l.* 13*s.* 4*d.*, being the balance due from the defendants to the plaintiff on the account as under, after giving credit for all payments on account, and for such sums as the defendants may have to set off against the plaintiff.

|                                         | £.  | s. | d. |
|-----------------------------------------|-----|----|----|
| 1840, May 12. To building water-wheel . | 100 | 0  | 0  |
| — Three cast-iron naves . .             | 4   | 0  | 0  |
| — Extra smith's work" . .               | 3   | 5  | 5  |

(and three other items, amounting to 9*l.* 2*s.*)

At the trial before *Williams J.*, at the last assizes at Welshpool, the jury found the issue joined on the plea of tender for the plaintiff. The plaintiff proved a claim only to the amount of 3*l.* 10*s.* On the part of the defendants it was contended that, according to the particulars of the plaintiff's demand, the case must be considered as though a plea of payment had been on the record to the plaintiff's demand minus the sum of 27*l.* 13*s.*, and that the plea had been proved, and that therefore as he had failed to make out a demand exceeding that sum, he ought to be nonsuited. The learned judge overruled the objection, reserving leave to the defendants to move to enter a nonsuit.

The particulars of the plaintiff's demand stated the action to be brought to recover a "sum of 27*l.* 13*s.*, being the balance due after giving credit for all payments on account, and for such sums as the defendant might have to set off against the plaintiff;" the particulars then stated the items of the plaintiff's demand to the amount of 120*l.*:—Held, that these particulars did not, within the meaning of the rule of Court, T. T. 1 *Vict.*, give credit for a sum of money admitted to have been paid, or that they did claim a balance within the meaning of the proviso.



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*Jervis* now moved accordingly. In this case the effect of the rule T. T. 1 *Vict.* (a) is, that the record must be taken as though there had been a plea of payment upon it and that plea had been proved. [*Patteson J.* It is consistent with these particulars that there may have been a payment of one shilling only, and that the residue may have been matter of set-off.] The plaintiff cannot avoid the effect of his admission by so stating it. It would not be evidence of a set-off. It is immaterial whether the particulars stated a payment in terms, or whether, after setting out the items, and thus shewing the total sum claimed, they clearly admit a reduction of that sum.

LORD DENMAN C. J.—In this case the particulars are not in such a form as to come within the rule, or, if they are, they come within the proviso excluding from the operation of it a claim of a balance not giving credit for any particular sum.

PATTESON J.—The rule was framed with a view of making it unnecessary to plead a payment of sums, of which the plaintiff specifically admits the receipt. Applications are frequently made at chambers to a judge to strike out a plea of payment, on the ground that the particulars admit the receipt of a specific sum, but here is nothing of the kind. Nothing can be more general than this statement. There is as much ground for saying that these particulars advert to a set-off as to a payment.

WILLIAMS J. and WIGHTMAN J. concurred.

G.

Rule refused.

(a) 3 N. & P. 381.



## The QUEEN v. LAWSON.

1841.

Monday  
May 3d.

SIR F. POLLOCK in Hilary term last obtained a rule for a criminal information against the defendant, the printer and publisher of the Times newspaper, for the publication of a libel reflecting upon the conduct of certain gentlemen as special jurors on the occasion of the trial of a quare impedit at the bar of the Court of Common Pleas in Ireland. The rule was granted on the affidavits of five of the jurors. One of them admitted that after publication of the libel, and after he had applied for and been refused the name of its author, he had written and sent to the "Editor of the Times" a letter containing some very severe observations on his conduct in publishing the libel complained of. The letter was dated from Bath the 26th December, 1840, and signed for "*self and fellows*," but he denied that it was written or sent with the knowledge or concurrence of any of his fellow jurors, and the other four applicants also denied that they had authorized him to write or send it, or that they knew of its having been written or sent till long after the day on which it bore date. It appeared from the affidavits in support of the rule, that this letter had been inserted in an Irish newspaper of the 5th January, 1841, and subsequently, but before this rule was applied for, in other Irish newspapers. An affidavit was produced by the defendant, in which the deponent stated that he had been informed by one of the applicants, not the author of the letter, that the same post which brought a copy of the letter to the editor of the Irish paper brought over a copy to each of the jurymen. All the applicants employed the same attorney.

Sir J. Campbell A. G. and Sir W. W. Follett (with whom was *Humfrey*) now shewed cause. The applicants have taken

know of it until some time after its date, it appearing that a copy of the letter had been sent to each of them, and their affidavits not stating when they received such copy, or that they did not know of the letter before publication.

One of several applicants for a criminal information against the publisher of a newspaper libel had addressed "To the Editor" a recriminatory letter bearing date the 26th December and signed by him on his own and their behalf. The letter, which was of such a character as to disentitle the writer to a rule for a criminal information, if he had been the sole applicant, was published in another newspaper of the 5th January following:—Held, that the other applicants were bound to have prevented the publication, or to shew that they had no opportunity of preventing it, and that it was not enough for them to state they were not parties to it and did not

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the law into their own hands by publishing the recriminatory letter addressed to the "Editor of the Times," and have therefore disentitled themselves to the summary interference of this Court. If the juryman who actually sent this letter were the sole applicant for this rule it would be discharged as of course. But it is clear that the other four applicants must be taken as parties to the publication of that letter. They state that they were not aware of its having been written and sent until after its date, but they do not state that they were not aware of it before publication, or before this rule was moved for, or that they disapprove of the contents of that letter, and the evidence on the other hand makes it probable that they concurred in the publication.

[Lord *Denman* C. J. then called on the other side, observing that the other four applicants ought to have denied their knowledge of the letter before publication, and to have stated that they took pains to prevent the publication.]

Sir *F. Pollock* (with whom was *J. W. Smith*) contrâ. More cannot be required from them than that they should deny they were parties to the publication. [Lord *Denman* C. J. If they knew the publication was intended, it was their duty to have stated to the party who was about to have recourse to the publication that, if he persevered in his intention, they would not join him in the present application. They do not state when they received the letter. *Patteson* J. It is quite consistent with their affidavits that, in the interval between the date of the letter and its publication, they knew the publication was intended, for the letter was signed by the writer for "self and fellows," and they were bound to prevent publication in that shape at least. If they did not know of the letter before the 5th January, when it was published, why do they not say so specifically; why, in speaking of their ignorance of the letter in reference to a certain time, do they pass over the very point of time which is the most material? They have stopped short when they might have

shown, if the facts admitted it, that they had done nothing to disentitle them to our protection.] Suppose each of them when he received this copy of the letter had thrown it into the fire, and taken no further notice of it.

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Lord DENMAN C. J. If they might have prevented the publication, and did not, they adopted it. No one can doubt that they received the letter several days before the publication. If then they knew that an attack was to be made in their name and on their account upon a person against whom they were afterwards to apply for a criminal information, it was their duty to take some steps to prevent the attack. This rule must be discharged.

PATTERSON, WILLIAMS and WIGHTMAN Js. concurred.

D.

Rule discharged (a).

(a) See *Reg. v. Gregory*, 1 P. & D. 110.

The QUEEN v. FENTON, Esq. and others.

Monday,  
May 3rd.

**COWLING**, in Hilary term last, had obtained a rule calling upon the defendants, justices for the county of Lancaster, to shew cause why a writ of mandamus should not issue, commanding them to hear and determine the complaint of *A. Brierley*, one of the churchwardens of the parish of Rochdale, in the said county, against *J. Butterworth* of the district or division of Castleton nearer side in the said parish, for not paying the sum of 7½*d.* rated and assessed upon him by a rate made the 16th October last, for the repairs of the church of the said parish &c.

In a parish where there are several churchwardens, each usually acting for a separate district, one churchwarden may lay a complaint, under 53 *Geo. 3*, c. 127, s. 7, against a resident in his district for non-payment of church rate.

*Brierley*, one of the churchwardens for the parish of Rochdale, which consists of ten districts and has ten churchwardens, in January last had preferred a complaint, before a magistrate against *Butterworth* for non-payment

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of the above church rate, of which the complainant stated in his complaint that he had demanded, and been unable to obtain, payment. In pursuance of this complaint the magistrate issued a summons, requiring *Butterworth* to appear before two magistrates and shew cause why an order should not be made upon him to pay the rate. *Butterworth* appeared accordingly before the defendants, when an objection was made to the complaint and summons, on the ground that the complaint by one only of the body of churchwardens was insufficient, under 53 Geo. 3, c. 127, s. 7. The defendants gave effect to this objection and dismissed the complaint.

The affidavit, on which the rule was granted, stated that the parish had consisted immemorially of ten districts; that it had always been the custom to choose ten churchwardens, one to act within each of the said districts exclusively; that *Brierley* acted for the Castleton nearer side district, in which *Butterworth* resided, and was the only person who acted for that district; and that there were no churchwardens who acted for the whole parish.

The affidavits in answer to the rule stated, that there had not uniformly been ten churchwardens for the whole parish; that the mode of electing churchwardens was, for the vicar to nominate one, and for the rate payers of the whole parish, without reference to any particular district, to vote for nine candidates; and that the church rates were always laid on the entire parish, and not upon the particular districts.

Sir *J. Campbell* A.G. *Baines* and *Arnold* shewed cause. The single churchwarden had no jurisdiction to demand the rate, and to prefer a complaint for its non-payment under 53 Geo. 3, c. 127, s. 7, which enacts that "if any one duly rated to a church rate, or chapel rate, the validity whereof has not been questioned in any ecclesiastical Court, shall refuse or neglect to pay the same sum at which he is so rated, it shall and may be lawful for any one

justice of the peace of the same county, riding, city, liberty or town corporate, where the church or chapel is situated, in respect whereof such rate shall have been made, *upon the complaint of any churchwarden or churchwardens*, chapelwarden or chapelwardens, who ought to receive and collect the same, by warrant under the hand and seal of such justice to convene, before any two or more such justices of the peace, any person so refusing or neglecting &c." The defendants were bound to dismiss the complaint, which could not have been legally made except by the whole number of churchwardens, or at least a majority. The statute says "churchwarden or churchwardens," using the singular number as well as the plural, to meet a case of parishes which have only one churchwarden; if it had been thereby intended to authorize a single churchwarden to act in all cases, the plural "or churchwardens" would not have been added, for the proceeding would not be vitiated by a plurality of churchwardens joining in it unnecessarily. The churchwardens are "a corporation, they act jointly together, for neither of them alone is that corporation, but both together, and consequently what one doth without the other hath no force in law. For should one of them alone commence the action in his own name without joining the name of the other with it, or when it is rightly commenced in the name of both, should either of them give a discharge from the action, or from the costs or damages which are recovered upon it, all that is so done is void and null in law, and so it will be in every thing else wherein either of them shall take upon him to act alone, in his office, without the other, except only in presentments;" *Prideaux's Churchwarden*, p. 142 (a), and the authorities there cited; 1 *Bl. Comm.* 394; *Doe d. Llandysilio v. Roe* (b). At common law, therefore, all, or the majority of, the churchwardens must concur in any proceeding to recover parish property. The statute has made no difference, and in an ecclesiastical suit, for which the complaint is substituted, the whole or

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(a) Ed. 1833.

(b) 1 Tyr. &amp; G. 1084.

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the majority must join. The general rule with respect to the execution of a public trust by a definite body of persons is, that the trust must be executed by a majority; *Blackett v. Blizzard* (a), and many decisions under the statutes relative to the management of the poor confirm the rule; *Rex v. Hinckley* (b), *Rex v. Inhabitants of Catesby* (c), and *Rex v. Justices of Warwickshire* (d). In *Astle v. Thomas* (e), where it was held that the churchwardens of a single township might maintain an action to recover money from their predecessors in office, separate rates were made for the separate divisions of the parish, and the judgment proceeds on that ground. *Rex v. Marsh* (f) puts it beyond all doubt that each churchwarden in this case is to be considered as churchwarden for the whole parish, although for the sake of convenience he may act for one district only.

*Cresswell* and *Cowling* contra were not heard.

LORD DENMAN C. J.—The words of the statute are not to be got over; the legislature may have contemplated the case of large parishes having several churchwardens, and used the singular number “churchwarden” advisedly.

PATTESON J.—In the poor law cases referred to, the plural only has been used.

WILLIAMS and WIGHTMAN Js. concurred.

D.

Rule absolute.

(a) 9 B. & C. 851; S. C. 4 M. & P. 153.

& R. 641.

(e) 2 B. & C. 271; S. C. 3 D.

(b) 12 East, 361.

& R. 492.

(c) 2 B. & C. 814; S. C. 4 D.

(f) 5 A. & E. 468; S. C. 6 N.

& R. 434.

& M. 668.

(d) 6 A. & E. 373; S. C. 2 N.



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 Tuesday,
 May 4.

RATTON v. DAVIS.

DEBT, in 200*l.* for work and labour, 200*l.* for money paid, and 200*l.* on an account stated. The declaration had only one count.

Pleas:—1st. Never indebted. 2d. And for a further plea, as to the sum of 17*l.* 6*s.* 3*d.* parcel of the debts and sums of money in the declaration mentioned, the defendant says, that the plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the defendant in 30*l.* for money had and received to the use of defendant, out of which the defendant offers to set off the sum of 17*l.* 6*s.* 3*d.* parcel &c. Verification. 3rd. And for a further plea as to the further sum of 2*l.* 10*s.* other parcel &c. the defendant says, that after the accrual of the causes of action in the declaration mentioned, as to the sum of 2*l.* 10*s.* parcel &c. and before the commencement of this suit, the defendant paid the sum of 2*l.* 10*s.* in full satisfaction and discharge, which payment the plaintiff accepted. Verification.

In debt for 200*l.* for work and labour, money paid, and on an account stated, the defendant pleaded, 1st, Never indebted; 2d, As to 17*l.* 6*s.* 3*d.* parcel &c. a set-off; and 3dly. As to 2*l.* 10*s.* other parcel &c. payment:—Held, on special demurrer, that the second and third pleas were good, without the allegation of *actionem non*, or prayer of judgment.

Special demurrer to the second plea, on the ground that it had no proper commencement, and that it did not thereby appear whether the plea was intended to be pleaded in abatement or in bar, or to the further maintenance of the action; that though expressed to be pleaded to a part only of the cause of action, it commenced, with reference to Reg. Gen. H. T. 4 Will. 4, as a plea in bar of the whole action generally; that it ought to have commenced with the allegation of *actionem non*, and to have concluded with a prayer of judgment. Similar demurrer to the third plea. Joinder.

Heaton, in support of the demurrer. The second and third pleas being pleaded to parts only of the causes of action, and not in bar of the whole action, the commencement by *actionem non*, and the prayer of judgment, are still necessary, notwithstanding Reg. Gen. H. T. 4 Will. 4, s. 9.

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[Lord Denman C. J. referred to *Weeding v. Aldrich* (a)]. That is an adverse authority, but there is a later case. The Court of Common Pleas held, that where a plea is expressed to be pleaded to part only of the plaintiff's demand, the formal commencement and conclusion are necessary; *Upward v. Knight* (b). The dictum of Parke B. in *Putney v. Swann* (c) was extra-judicial; and in *Bird v. Higginson* (d) the plea applied to the whole cause of action in one count of the declaration. The modern practice of pleading has followed the construction of the rule adopted in *Upward v. Knight* (b).

Fortescue contra was not called upon by the Court.

LORD DENMAN C. J.—We see no reason to depart from our former decision, which appears to be in accordance with the opinion of the Court of Exchequer.

PATTESON J.—I adhere to our decision in *Bird v. Higginson* (d).

WILLIAMS J. and WIGHTMAN J. concurred.

Judgment for defendant.

(a) 9 A. & E. 861; S. C. 1 P.
 & D. 657.
 (b) 5 Bing. N. C. 338.

(c) 2 M. & W. 72.
 (d) 2 A. & E. 696; S. C. 4 N.
 & M. 405.

Tuesday,
 May 4th.

HARDEN v. CLIFTON.

A plea, to debt on bond, that after its execution a material addition was made to the condition thereof:—Held bad, for not stating that the addition was made in writing to the condition itself.

DEBT on a bond for 1200*l.*, executed by one *Lucas*, the principal debtor, and by the defendant and one *Deacon* as his sureties, conditioned to be made void on payment of 600*l.* and interest.

Plea, that after the making and sealing of the said writing

thereof:—Held bad, for not stating that the addition was made in writing to the condition itself.

obligatory in the said declaration mentioned, a certain material addition was made to the condition thereof by the plaintiff, and with his privity, and without the knowledge or consent of the defendant; which said addition was and is as follows, that is to say, that the giving day of payment for the said principal and interest, or any part thereof respectively, to the said *Lucas* (the principal debtor), his executors &c. from time to time, should not discharge the said defendant and the said *Deacon*, their heirs &c. as such sureties as aforesaid; whereby the said writing obligatory was and is wholly void; and this the defendant is ready to verify &c.

Replication, de injuriâ &c.

Special demurrer to the replication, that de injuriâ &c. cannot be replied to the plea, the subject-matter of the plea not being matter of excuse, but in absolute avoidance of the contract; and that de injuriâ cannot be replied in an action of debt on a specialty; and that a traverse of the plea should be a direct denial of some material averment therein contained. Joinder.

Martin, in support of the demurrer. First, the plea is an answer to the action. Time given to the principal obligee for payment, if given under seal, and without the knowledge of the surety, is a discharge of the surety at law: if given by parol only, it will discharge him in equity, *Rees v. Berrington* (a). The alteration of the condition was therefore material, and whether made by the plaintiff himself, or by a stranger, will make the deed void; *Pigot's case* (b).

The Court then called upou

Byles contrâ. [The argument in support of the replication is omitted, as the Court gave judgment on the plea.] The plea is bad; it omits to state that the addition to the condition was made under seal, or that it was placed above

(a) 2 Ves. jun. 540.

(b) 11 Rep. 27; *Shepp. Touchst.*
p. 68, *Com. Dig.* (Fait) F. 1.

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the seal of the bond, or that it was in writing, or was contained in the same instrument. Unless the addition was made under seal, it would not operate as a discharge of the defendant, because if time be given to the principal under a *parol* agreement, that is not a defence at law to an action on a bond against the surety, *Davey v. Prendergrass*(a); and unless the addition was in writing, it would not make the deed void.

Martin in reply. The objections to the plea are to be taken as on a general demurrer, and certainty to a common intent only is required. The plea shews an addition to the condition of the bond, and the condition is in writing and under seal. The alteration might be given in evidence under *non est factum*.

LORD DENMAN C. J.—I think this is a bad plea. It appears from the authorities cited that a deed is made void if it be altered after execution in any material part by rasure, interlineation, addition, or drawing a pen through a line or material words. The expressions used assume that the addition is in writing, and if the defendant had pleaded that a material alteration was made in writing in the condition of the bond, our judgment might have been different. As it is, the plaintiff is entitled to our judgment for the defect in the plea.

PATTESON J.—The language of the plea is too vague. It was necessary for the defendant to aver in substance, that the bond was materially altered by a written addition to the writing itself.

WILLIAMS J. and WIGHTMAN J. concurred.

Judgment for the plaintiff.

(a) 5 B. & Ald. 187.

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Friday,
April 16th.

HENWOOD v. OLIVER.

ISSUE joined on a plea of tender. At the trial before *Wightman J.*, at the last assizes for the county of Cornwall, a witness was called whose evidence was, "I went to plaintiff, I told him I came with the amount of *Oliver's* bill, 15*l.* 16*s.* 9*d.* The plaintiff said he should not take that, it was not his bill. I offered it to him as the amount of his bill." It was objected on the behalf of the plaintiff, that the evidence shewed a conditional tender. The learned judge ruled that the tender was a good one, and directed a verdict for the defendant, reserving to the plaintiff leave to move to enter a verdict.

In support of a plea of tender, the evidence of the witness was, "I went to plaintiff, and told him I came with the amount of *Oliver's* (the defendant's) bill. The plaintiff said he would not take it, it was not his bill. I offered it to him as the amount of his bill."

Moody now moved, pursuant to the leave reserved, for a rule to shew cause why the verdict should not be entered for the plaintiff on this issue. If the plaintiff had taken the sum thus tendered, he would have been precluded from bringing an action to recover any sum beyond it. In *Sutton v. Hawkins* (a), in support of a plea of tender, a witness proved that "the defendant went into the plaintiff's shop and offered to pay Mrs. *Sutton*, the plaintiff's wife, 6*l.* 19*s.* He put down seven sovereigns and asked for a shilling as change; he did not offer 6*l.* 19*s.* as *part* payment, but offered that sum as all that was due;" and *Alderson B.* ruled that that was no tender. The learned judge said, "If a party takes a sum properly tendered, he does not thereby compromise his future claim to more. Now if Mrs. *Sutton* had taken this money, her husband could not have gone for more, as it was offered as all that was due." [*Patteson J.* I think there must be some error in the report of that case; if the defendant had tendered the sum as part, it would have been said to have been an admission that more was due. When a man makes a tender, in all cases he intends it as a tender of all that is due. If a man says, "There is 10*l.*," what difference can it make if he adds, "which is

Held, that this tender was good, and that the plaintiff might have accepted the amount without thereby making any admission that no more was due.

(a) 8 C. & P. 259.

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the sum I owe you." *Expressio eorum quæ tacite insunt nihil operatur.*]

In the case of *The Marquis of Hastings v. Thorley* (a), the tender was, "I tender you 21*l.* in payment of the half-year's rent due at Lady-day last," and Lord *Abinger* was of opinion "that this was not a lawful tender, because, if the agent had received this money, he would by receiving it have admitted that that sum was the amount of a half-year's rent," and the Lord Chief Baron is reported to have said, "If a man makes a tender, he cannot do it in such terms, as by the taking of the money he causes the other party to make any admission, because if he does so, it is a conditional tender, and therefore bad."

LORD DENMAN C. J.—In every case of tender the defendant tries to get rid of the whole debt. A conditional tender is certainly bad. In many instances it must be a question for the jury, whether the tender has been in such a form that the plaintiff could not take it without admitting the sum tendered to be the whole of his claim. In this case the defendant did not require that the opinion of the jury should be taken on that question. I think that the plaintiff might have taken the sum offered, if he had thought proper, and afterwards gone on for more.

PATTESON J.—I agree that a tender is not good if the party tendering require an admission that nothing more is due, but this was simply a tender of that which the defendant said was the amount due, a fact which the plaintiff would afterwards have been at liberty to contest.

WILLIAMS J. concurred.

WIGHTMAN J.—The cases cited raised, at *Nisi Prius*, some doubt in my mind, but I am of opinion that the plaintiff might have accepted this tender, and proceeded to recover more.

G.

Rule refused.

(a) 8 C. & P. 573.

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Tuesday,
April 20th.

FENWICK v. LAYCOCK.

DEBT for goods sold and delivered. Plea, nunquam indebitatus. At the trial before Lord *Denman* C. J. at the last assizes at Kingston, it appeared, on the evidence given by the plaintiff to prove his case, that the goods in question were fireworks. It was objected on the part of the defendant that the sale was of a prohibited subject-matter, and that that defence was admissible without a special plea. Lord *Denman* C. J. on the latter ground ruled against the objection, and the plaintiff had a verdict.


A defendant cannot take advantage of an illegality to avoid a contract, without an appropriate special plea, though the illegality becomes apparent in the course of the plaintiff's case, and without any evidence being offered by the defendant.

Creasy now moved for a new trial (a). No special plea was necessary. There is a distinction in the application of the rules of pleading between those cases, in which the illegality vitiating the contract is shewn by substantive evidence given by the defendant in answer to a *prima facie* case made out by the plaintiff, and those cases in which it is apparent on the proof given by the plaintiff in order to make out any contract at all. The R. H. T. 4 *Will.* 4, tit. Assumpsit 3, refers only to matter in confession and avoidance, requiring, in order to allow the reception of evidence of such matter, that it should be specially pleaded. This was a contract sought to be implied by law, but the prohibition of the law to sell this species of goods prevented the implication arising. The 4th and the 17th section of the Statute of Frauds, 29 *Car.* 2, c. 3, may be taken advantage of without a special plea: *Buttemere v. Hayes* (b). The terms of prohibition, by the statute, of the sale of fireworks, "it shall not be lawful to sell (c)," are equivalent to those of the 4th section of the Statute of Frauds, "no action at law shall be brought:" and of the 17th section, "no contract for the sale of any goods &c.

(a) Before Lord *Denman* C. J.,
Patterson, Williams and Wightman
Jrs.

(b) 5 M. & W. 456.

(c) See the stat. 9 & 10 W. 3,
c. 7, s. 1.

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shall be allowed to be good." [Lord *Denman*. All that this plea says is, " You sold me no goods."]

Cur. adv. vult.

Lord DENMAN C. J. (April 23) delivered the judgment of the Court.—We are of opinion that it must be taken to be a general rule, and open to no doubt, that the defendant cannot take advantage of any illegality to avoid a contract, without pleading specially, whether the evidence be given by the defendant, or the illegality appear in the evidence given by the plaintiff.

G.

Rule refused.

Thursday,
 April 29th.

The QUEEN v. The MAYOR of LICHFIELD,

Where the overseers of one of several parishes in a borough omitted to make out the burgess list required by 5 & 6 W. 4, c. 76, s. 15, so that at the Revision Court of the mayor there was no list in which the name of a claimant for that parish could be inserted:—Held that this intermediate defect in his title to be on the general burgess roll, which is made up of the several parish lists, did not preclude this

WIGHTMAN, in Michaelmas term last, obtained a rule to shew cause why a mandamus should not issue commanding the defendant to insert the name of *John Mott* upon the burgess roll of the borough of Lichfield.

The overseers of the Close, one of the parishes of the borough of Lichfield, neglected to deliver the burgess list of that parish to the town clerk, on the 5th September last, in compliance with 5 & 6 Will. 4, c. 76, s. 15, and consequently no printed list for that parish was exhibited by the town clerk as required by that section. Mr. *Mott*, on the 15th September, sent in his notice of claim under sect. 17, to have his name inserted in the burgess list of the borough, in respect of an occupation in the parish of Close, and his name duly appeared in the list of claimants. At the Revision Court on the 6th of October following, Mr. *Mott's* claim was gone into, and his qualification to be a burgess under sect. 9, by occupation &c., established; but, as no list for the Close was produced, and the mayor was of opinion that he had no power, under sect. 18, to insert Mr.

Court from issuing a mandamus for the insertion of his name under 1 Vict. c. 78, s. 24.

Such a mandamus is not peremptory in the first instance.

Mott's name in any of the lists for other parishes, or to make out an original list for the Close, the claim was rejected.

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Jervis and *Waddington* shewed cause. The 1 *Vict.* c. 78, s. 24, which enacts, "That it shall be lawful for any person whose claim shall have been rejected or name expunged at the revision of the burgess roll &c., to apply to the Court of King's Bench for a mandamus to the mayor for the time being &c. to insert his name on the burgess roll, and thereupon for the Court to inquire into the title of the applicant to be so enrolled," puts the claimant in no better situation, with respect to title, than he was at the Revision Court of the mayor. The burgess roll, by 5 & 6 *Will.* 4, s. 22, must be made up from the burgess lists sent in by the overseers, and revised by the mayor and assessors; and it is an essential part of the claimant's title that there should have been sent in by the overseers some parish list in which his name could have been introduced. The title, therefore, to be inquired into by this Court means the title which the claimant had at the legal time of trying the question, which was when he was before the Revision Court; if he had no such title as the mayor could recognize, he has no such title as this Court will give effect to by mandamus. Now it was part of his title before the Revision Court that there should have existed some list to be revised by the mayor and the assessors for the parish in which Mr. *Mott* occupied; for the mayor (5 & 6 *Will.* 4, c. 76, s. 18) has no authority to originate any list, but merely to insert or expunge names in lists actually produced before him, and "to correct any mistake, or supply any omission which shall be proved to the Court to have been made in any of the said lists in respect of the name or place of abode of any person who shall be included in any such list, or in respect of the local description of his property." Mr. *Mott's* name ought to have been in the list for the parish of the Close; had there been such a list,

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the mayor might have supplied the omission in it, but he could not supply the omitted list itself. The statute required that the overseer should make out these lists by a certain time before the revision at the Mayor's Court takes place, in order that they might be made public, and opportunity be afforded of objecting to improper claims. The statute is imperative in this particular, as appears from section 48, which imposes a penalty on the overseers who fail to comply with its provisions. This imposition of a penalty, which was recently enforced by this Court in *King v. Burrell (a)*, shews that the matter was considered to be of vital importance to the title of the burgess. If the overseers neglect to send that parish list in which a party has a right to have his name inserted he has no redress, and his right to be on the general burgess roll is gone.

Sir *W. W. Follett* contra. The 1 *Vict.* c. 78, s. 24, enables this Court to give redress by mandamus to every person whose "claim shall have been rejected" at the Revision Court, and it cannot be denied that Mr. *Mott's* claim was there rejected. This statute meant to cure any formal defects in a party's title by authorizing this Court to adjudicate on the substantial merits of his case, without any reference to the decision in the Mayor's Court. In the form given, in schedule (D) of 5 & 6 *Will.* 4, c. 76, for the list of claimants, the claim made is, that the name be inserted on the burgess list of the borough generally, and not on any particular parish list. The present application has been met in argument as if it were an application to be on some particular parish list. The publication of the list of *claimants* is quite sufficient notice to parties wishing to object at the Revision Court, although the objectionable name may not appear on the parish list of burgesses made out by the overseers.

Lord DENMAN C. J.—By the 1 *Vict.* c. 78, s. 24, any

(a) 9 *Law Journ.* (New Series) Q. B. 337; *S. C.* 4 P. & D. 207.

party "whose claim shall have been rejected or name expunged," may apply to this Court for a mandamus to the mayor to insert his name on the burgess roll, and thereupon this Court may inquire into the title of the applicant to be so enrolled, and, if satisfied of his title, order the insertion of his name accordingly. The general title of Mr. *Mott*, by occupation and payment of rates, is not questioned: but it is said, as the general burgess roll must be made up from the several parish lists sent in by the overseers, after such lists shall have been amended at the Revision Court of the mayor by the insertion in *them* of names improperly omitted, and by the striking out of names improperly placed there, and as there was no list whatever for Mr. *Mott's* parish in which his name could be so inserted, that this necessary step in Mr. *Mott's* title could not be supplied, and that consequently he had not then, and has not now, good title to be on the burgess roll. I cannot, however, conceive that Mr. *Mott* is deprived of his rights by the neglect of the overseers. I do not at all recede from the decision of this Court in *King v. Burrell* (a). It is most desirable that overseers should recollect that it is their duty to make out the burgess lists in conformity with the statute, and that they are liable to a penalty if they neglect to do so. But I think we ought to put a liberal construction on the statute of *Victoria*, and not to suffer a party to be deprived of his undoubted right to be on the burgess roll because of the intermediate defect in the parish lists. Mr. *Mott's* "claim" was "rejected," though his "name" was not "expunged." This rule, therefore, will be absolute.

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PATTESON J.—The only difficulty there has been in this argument is to establish that the case comes within the 24th section of the statute of *Victoria*, for, if it does not, we have no power by mandamus. Now we may grant the mandamus where the claim of a party has been rejected as

(a) 9 Law Journ. (New Series) Q. B. 337; S. C. 4 P. & D. 207.

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well as where his name has been expunged. Mr. *Mott* certainly did make a claim and it was rejected. The term "*burgess roll*" in this section seems to be used improperly, for the *burgess roll* is not revised at all, a party's name cannot be expunged from that; it is the *burgess lists* that are revised, and the town clerk, by the 5 & 6 *Will.* 4, c. 76, s. 22, has afterwards to copy them into one general alphabetical list in a book, and that book, which the town clerk alone is trusted absolutely to make up, is the *burgess roll*. At first I thought we could do no more in these cases than supply what the mayor had omitted to do; I wanted, therefore, to see what the mayor could do. The mayor could not comply strictly with the statute by inserting Mr. *Mott's* name, for there was no proper parish list in which it could be inserted. If the overseers had sent in a paper for Mr. *Mott's* parish, stating thereon that there were no persons entitled to be on that list, the mayor could not have inserted the name falsely in the list for any other parish, yet I am not sure that he might not have made a list for the parish omitted. But whether he could do so or not, I think this case is within the 24th section of the late statute, and that we have now power to order his name to be inserted in the *burgess roll*.

WILLIAMS J.—I am of the same opinion. The statute of *Victoria* should receive a fair and liberal construction. The argument appears to me to have proceeded somewhat on the assumption that it is sought to insert Mr. *Mott's* name on a list, which, *ex concessis*, never existed, for the parish of the Close. If formerly there was no list on which his name could have been properly placed, there is such a list now, viz. the general *burgess roll*. It is admitted that he had substantially a good claim, and that he did all in his power to vindicate it. He applies to us now to order his name to be inserted on the *burgess roll*. It is clear that his name ought to be there, and the language of the statute is large enough to afford him the relief sought by the present application.

Lord DENMAN C. J. said the mandamus would not be peremptory in the first instance.

Rule absolute (a).

(a) *Wightman J.*, having been engaged as counsel in the case, gave no opinion.

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Monday,
April 26th.

EJECTMENT, on the demise of *Thomas Davies*, for a farm called Pantynos, or Pantynosfawr, in the county of Cardigan. The lessor of the plaintiff claimed the farm in question under the will of *Rees Evans*, dated May 14, 1802, whereby, after directing that his funeral and testamentary expenses should be first paid out of his personal estate, he gave and devised as follows:—"I give and devise all and singular my messuages, lands, tenements, and hereditaments, and all other my real estate in the county of Cardigan, and all my said estate, right, title, and interest therein and thereto respectively unto my friends *John Davies* of &c. and *Thomas Jones* of &c. *their heirs and assigns*, to hold unto the said *John Davies* and *Thomas Jones*, *their heirs and assigns for ever*, upon trust and to and for the several ends, intents, and purposes hereinafter mentioned, expressed and declared of and concerning the same, that is to say, upon trust and to the intent and purpose that *Anne*, my beloved wife, shall and may have, hold and occupy, possess and enjoy all and singular &c. the above-mentioned hereditaments, for and during the term of her natural life, without any interruption whatever by any person or persons claiming or to claim the above-mentioned messuages, lands, and premises. And upon this further trust, and to the further intent and purpose that *Thomas Davies* (the lessor *Devise of lands and all testator's estate, right, title &c. therein, to trustees, "their heirs and assigns for ever," upon trust, and to the intent that A. should hold to him and his assigns for life, subject to the payment of an annuity, and to the further intent that he should cut as much timber as should be necessary for the use of the farm; and after A.'s death then to the use and behoof of the trustees "and their assigns in trust," and I give the same unto B. his heirs and assigns for ever, and, for want of issue, to the use and behoof of my trustees and* *their assigns*, in trust to preserve the uses &c. from being defeated; and for want of such issue to *C.* his heirs and assigns for ever, and furthermore upon this trust, and the further intent that my trustees, their heirs or assigns, by mortgage or demise of my real estate, or from the rents, or by such other ways as they shall think fit, raise 80*l.* for payment of my debts:—Held, that the trustees took the legal estate in fee.

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of the plaintiff) nephew of my said wife, may have, hold, occupy, possess and enjoy, all and singular the above-mentioned messuages, tenements, lands and premises, to him and his assigns for and during the term of his natural life, subject, nevertheless, to the payment of an annuity of 4*l.* unto *Rees Morgan*, of &c. my nephew &c. And to the further intent and purpose that the said *Anne*, my wife, and, *Thomas Davies* (lessor of the plaintiff), during their respective lives may and shall cut on the premises aforesaid as much wood and timber as shall be necessary for the use of the persons on the premises aforesaid. And for and concerning the before mentioned messuages, lands and premises, farm, and other the devises of the said *Anne* my wife and the said *Thomas Davies* (lessor of plaintiff), then to the use and behoof of the said *John Davies* and *Thomas Jones* and their assigns in trust. And I give and devise the same unto my said nephew *Rees Morgan*, his heirs and assigns for ever, and for want of such issue to the use and behoof of the said *John Davies* and *Thomas Jones* and their assigns, in trust to preserve the uses and remainders from being defeated; and from and for want of such issue, to the use and behoof of *David Morgan*, eldest son of the said *John Morgan*, his heirs and assigns for ever, and for want of such issue, to the other sons of the said *John Morgan*, considering the seniority of age and priority of birth to be first taken, and to their respective heirs and assigns, one after the other as aforesaid. And furthermore and upon this trust and the further intent and meaning that the said *John Davies* and *Thomas Jones*, their heirs or assigns, do and shall, by mortgage or demise of my said real estate, or from the rents, issues, and profits thereof, or by such other ways and means as my trustees shall think fit, raise and levy, or borrow and take up at interest on the said real estate, the sum of 80*l.* and do and shall pay and apply and dispose of the same to that amount of my just debts contracted by me and laid on certain purposes."

The testator appointed his wife sole executrix and

died in 1802, and his widow (who was married to the defendant) died also in 1833. In 1815 *John Davies*, the surviving trustee, executed a conveyance of the legal estate to the defendant. At the trial before *Gurney B.* at the Cardiganshire summer assizes in 1839, it was contended on behalf of the defendant that, under the will of *Rees Evans*, the legal estate in the premises was vested, not in the lessor of the plaintiff, but in the trustees; and *Gurney B.* thereupon nonsuited the lessor of the plaintiff, with leave to move to enter a verdict; the Court to be at liberty to draw any presumption from the facts which a jury might have drawn.

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J. Evans accordingly obtained a rule nisi to set aside the nonsuit, and enter a verdict for the lessor of the plaintiff.

J. Wilson and *E. V. Williams* now shewed cause. The first question is, whether the devise to the trustees of all the testator's real estate vested in them the legal estate in fee. The authorities on this point are collected in a note to *Jefferson v. Morton* (a), and the result of them is stated to be that "where something is to be done by the trustees, which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is in them." Here the trustees are directed either by mortgage of the real estate or by receipt of the rents to discharge the testator's debts, but no time is specified: they must take the legal estate in fee. Then, secondly, can the Court presume a reconveyance of the legal estate? That presumption is rarely drawn in favour of one entitled for life only, and it is rebutted both by the evidence at the trial, and by the conveyance from the surviving trustee to the defendant.

J. Evans and *R. C. Nicholl* contra, contended that the

(a) 2 Wms. Saund. 11 b, note.

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use limited to the lessor for life was a use executed. He is to pay an annuity out of the rents, and may cut timber. The intention of the devisor is to be collected from his will. As a general rule, trustees take only such estate as is sufficient for the purposes of the trusts. A devise to trustees and their heirs will pass only a chattel interest, if that is sufficient for the purposes of the trust: *Doe d. White v. Simpson* (a), *Warter v. Hutchinson* (b). [*Patteson J.* There the trustees were special occupants for lives only.] The same rule of construction is recognised in the several authorities collected in a note to *Powell on Devises*, p. 225 (c), note. [*Wightman J.* If the trustees did not take the whole legal estate, what estate did they take?] The devise to sell, mortgage or dispose of freehold estate for payment of debts would pass a power only without an interest: *Lancaster v. Thornton* (d), *Doe d. Hampton v. Shotter* (e); or a mere chattel interest to raise the sum of 80*l.* by a demise, or a base fee determinable on receipt of 80*l.*: *Ackland v. Lutley* (f), *Doe d. Noble v. Bolton* (g). The Court will now presume that the trusts are satisfied. The repetition of a devise to the same trustees, when they are named as trustees to preserve, shews that it was not the intention of the testator to give them the fee by the first devise. In *Doe d. Compere v. Hicks* (h), limitations to trustees and their heirs, interposed between successive estates for life, were held not to pass the absolute fee. [*Patteson J.* cited *Harton v. Harton* (i).] There the Court held that the fee simple vested in the trustees, in order to protect the separate interests of *femes covert*; and Lord *Eldon C.* in *Hawkins v. Luscombe* (k), in allusion to that case, said, that the Court "relied on the non repetition of the legal estate, and that if there had been a

(a) 5 East, 162.

(f) 9 A. & E. 879; S. C. 1 P.

(b) 1 B. & C. 721; S. C. 3 D. & R. 58.

& D. 636.

(c) 3rd edit.

(g) 3 P. & D. 193.

(h) 7 T. R. 433.

(d) 2 Burr. 1027.

(i) 7 T. R. 652.

(e) 8 A. & E. 905; S. C. 1 P. & D. 124.

(k) 2 Swanst. 391.

repetition of the legal estate after every trust for a married woman, they would not have held the whole legal estate to be in the trustees." Then if the legal estate vested in the trustees for the purpose of raising the sum of 80*l.*, the Court, at this distance of time, and after the debts are barred by the statute of limitations, will presume that the trust is satisfied: *Doe d. Brune v. Martyn* (a). The legal estate will then vest in the lessor of the plaintiff, as the person beneficially entitled to it: *Doe d. Player v. Nicholls* (b), *Heardson v. Williamson* (c), *Doe d. Cadogan v. Ewart* (d). If necessary, a conveyance will be presumed: *Doe d. White v. Simpson* (e). [*Patteson J.* There are cases where a conveyance has been presumed, when the trustee took the legal estate for limited purposes only, which have ceased; but I do not recollect any case where a conveyance from a trustee, who originally took a fee simple, has been presumed.] Here the trustees took a mere power in a limited interest, or an estate for limited purposes only.

Lord DENMAN C. J.—I entertain a clear opinion that under this will the trustees took the legal estate in fee. The testator, in the first instance, devises to them, their "heirs and assigns," upon trust for his widow and his nephew, the lessor of the plaintiff, who have, it must be admitted, considerable powers. The will then contains a strangely worded provision for trustees to preserve uses and remainders, on which much reliance is placed in the argument. That clause can only be explained by considering that the testator was not learned in the profession. But the testator proceeds to give the same trustees power "by mortgage or demise of his real estate," (not by sale, which might imply only a power) "or from the rents, issues and profits thereof, or by such other ways and means as they shall think fit," (giving them at their option all possible

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(a) 8 B. & C. 497; S. C. 2 M. & R. 485.

(b) 1 B. & C. 336; S. C. 2 D. & R. 480.

(c) 1 Keen, 33.

(d) 7 A. & E. 636; S. C. 3 N.

& P. 197.

(e) 5 East, 163.

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means of dealing with the estate,) "to raise and levy or borrow and take up at interest on the said real estate the sum of 80*l*." (not saying within what period or in what proportions), and apply the same to that amount of his just debts contracted by him, "and laid on certain purposes," which is unintelligible. When I find that these powers follow in the will after the ambiguous parts of the instrument, I cannot bring myself to doubt that it was the testator's intention to give the trustees full and entire dominion over his real property. Without questioning former cases on this subject, I may say that the language of some of the judges has gone too far; as, for instance, when it is said that, on performance of the trusts, the jury should be directed to presume a reconveyance, if necessary, to the persons beneficially entitled under the will, though the trustees might originally have taken the legal estate for a longer time than until the purposes of the trusts were satisfied. Mr. Justice *Holroyd* has correctly said that the estate is in the trustees during the time required by the purposes of the trust, where there are no words in the will which give them any estate beyond the time they may be in course of performance. In the will now before us, the time for performing the trusts is left wholly indefinite and uncertain. In the two recent cases of *Doe d. Shelley v. Edlin* (a), and *Doe d. Cadogan v. Ewart* (b), this Court has narrowed and qualified the former wide construction which the cases seemed to warrant: and I may mention that the judgment in *Doe d. Shelley v. Edlin* (a), though delivered in the singular number, was the judgment of the whole bench and prepared by my brother *Littledale*. In those cases the doctrine is clearly laid down that although the testator may have used the words of limitation, which of themselves alone, if not coupled with other expressions, would seem to carry an estate of inheritance, the estate is vested in trustees, during the period necessary for the purposes of the trusts, and no longer, if they originally take only

(a) 4 A. & E. 582.

(b) 7 A. & E. 636; S. C. 3 N. & P. 197.

that quantity of interest which the purposes of the trust require, as far as is expressed by words used in the instrument itself, or by the apparent intention of the maker of the instrument consistent with the language of it: but, that if words which convey an estate of inheritance are used, and there is nothing in the will, either in expression or apparent intention, which shews that the exigencies of the trust can be satisfied by the trustee taking a less interest than an absolute estate in fee simple, the trustee retains the legal estate until he has made a conveyance. In this will words of inheritance are used, and no such expression or apparent intention is found in it. Then, can we presume a re-conveyance? I think not; and I should so direct a jury on the facts, if the question was tried before me.

PATTESON J.—The doctrine on this subject was laid down in *Doe d. Shelley v. Edlin* (a), and *Doe d. Cadogan v. Ewart* (b), after much consideration; and this case falls within it. If there be a devise to trustees for purposes which are to last for a certain definite time only, the use of the word “heirs” will not extend their estate, because the estate is given to them for a limited period only. But if words of inheritance are used by the testator, and the trusts are for an indefinite time, the estate to the trustees will not be cut down by performance or the incapability of performance. In this will the trustees are directed to raise a certain sum of money by mortgage or demise, or by any other ways and means they may think proper: but the testator has not directed when they shall do it, or limited any time. They may have already mortgaged or demised part of the property for that purpose. But if, under this devise, they have the legal estate in a part, why have they not the legal estate in the whole? The fee simple given to them in the first instance has not been cut down, and I think, therefore, that the nonsuit must stand.

(a) 4 A. & E. 582.

(b) 7 A. & E. 636; S. C. 3 N. & P. 197.

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J. Henderson in support of the demurrer. It appears on the record that this is a wager for a sum exceeding 10*l.* on a horse race, and it is therefore void under stat. 16 *Car.* 2, c. 7, and 9 *Anne*, c. 14. [Lord *Denman* C. J. But this is a wager on a race which had been run at the time of the betting. The event had happened; the knowledge of the parties was alone uncertain.] No distinction has been ever drawn on that ground; a wager on a past race is equally against sound policy, and within the mischief of the statute. [Lord *Dennan* C. J. Have you any authority that a wager on a past event is void?] No case has been decided on that ground. In *Da Costa v. Jones* (a) the sex of the Chevalier *D'Eon*, which was the subject of the wager, was not in itself doubtful, though unknown to the parties. In *March v. Pigot* (b), and *Good v. Elliott* (c), where the wager was on a past event, the Court drew no distinction on that ground, and in neither case was the wager of a kind prohibited by common law or statute. Here, assuming that the race was not illegal, the wager is void for exceeding 10*l.* on one side. By stat. 18 *Geo.* 2, c. 34, the loser of more than 10*l.* at any one time on a wager is made liable to indictment.

Fortescue contra. This wager is not void at common law: *Good v. Elliott* (c). In that case *Grose* J., adopting the opinion of Lord *Manfield*, that wagers are not void quâ wagers, stated the rule to be "that those wagers are bad which by injuring a third person disturb the peace of society, or which militate against the morality or sound policy of the kingdom." *Gilbert v. Sykes* (d) was decided on the ground that the wager in that case was of immoral tendency. Then is this wager prohibited by stat. 9 *Anne*, c. 14? That statute subjects to a penalty any person who shall, "by betting on the side of such as shall or do play," win, at any one time, more than the sum of 10*l.* But there

(a) Cowp. 729.

(b) 5 Burr. 2802.

(c) 3 T. R. 693.

(d) 16 East, 150.

is an express allegation in this declaration, that at the time of the wager the race had been run. Without straining the words of the statute, this cannot be called a wager on the side of such as "do or shall" play. The various cases in which wagers above 10*l.* have been held good since the passing of 18 *Geo. 2, c. 34, s. 8*, shews that statute does not make this wager void merely because it is above 10*l.*

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Cur. adv. vult.

LORD DENMAN C. J. at the sittings after this term (May 10th) delivered the judgment of the Court (*a*) as follows:—The plaintiff by his declaration sought to recover 50*l.* on a wager of 50*l.* to 1*l.* laid on the 16th May, 1839, that a horse called Bloomsbury had won a race called the Derby, which had been run on the 15th of May by Bloomsbury and other horses, with an averment that Bloomsbury had, at the time of making the wager, won the race.

Plea, that the consideration for making the promise was an illegal bet made by plaintiff, viz. a bet of 1*l.* to 50*l.* on the result of the horse race mentioned in the declaration.

The question raised by demurrer was, whether a wager on a horse race already passed is illegal.

It is clear, from a long train of authorities, that this bet is void within the 9th *Anne*, if that statute applies to a bygone horse race. The words of the enactment are, with reference to this question, "if any person shall, by betting on the side of such as shall or do play, win, or acquire to himself any sum of money, every person so winning, at any one time, or betting above the sum of 10*l.* shall, upon conviction for such offence, forfeit five times the value of the sum so won."

It follows that an action cannot be maintained for a bet so won. But could it be said truly of the plaintiff, at the time of betting, "he is betting on the side of such as shall or do play?" We think not: the play was over; the race was

(a) Lord Denman C. J., Patterson, Williams and Wightman Js.

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lost and won. The wager neither accompanied anything then in a course of being done, nor contemplated anything then remaining to be done. It appears to us that no latitude of construction can bring such a wager within these words. It can hardly be said to be a wager on the event of the game, but rather on the accuracy of the information respecting it that either party possessed. We cannot, therefore, say that this wager is prohibited by the act, or prevent plaintiff from recovering.

Judgment for the plaintiff.

*Tuesday,
 May 4th.*

NEWTON v. ALLIN.

In covenant by landlord against tenant, on a farming lease, assigning breaches on the defendant's covenants: 1. to repair; 2. not to plough meadow land; 3. or depasture orchards; 4. or cut, lop or injure trees, woods or plantations, &c.; 5. or assign or underlet the demised premises, or any part thereof, without the plaintiff's consent in writing; the defendant pleaded that before any of the breaches assigned he was evicted and kept out of part of the demised premises by the authority of the plaintiff:—Held, that the plea afforded no defence to the action.

COVENANT. The declaration stated, that by an indenture dated 1st December, 1837, the plaintiff demised and leased to the defendant certain messuages and premises therein described, for the term of thirteen years, at an annual rent of 160*l.*, payable quarterly: that the defendant thereby covenanted, 1. to repair and keep in repair the demised premises; 2. not to plough or convert to tillage any of the meadow land; 3. or to stock or depasture the orchards; 4. or cut, top, lop, pare, prune or destroy or injure the trees, woods and plantations, or saplings, or cut wood from the hedges, except at seasonable times; 5. or assign or underlet the demised premises or any part thereof, without the consent of the plaintiff in writing. Breaches were assigned on each of these covenants; and, in respect of the 5th, that after the making of the said indenture, and during the continuance of the said term, and before the commencement of this suit, to wit, on the 25th March, 1839, the defendant, without the consent of the plaintiff in writing, underlet a part of the said demised premises to one *Sias*

Martim, who, by virtue of such underletting, on the day and year aforesaid, entered into possession of the said part of the said premises so underlet as aforesaid.

Plea (12thly): that after the making of the said indenture, and after the defendant had taken possession thereunder, and before any of the breaches above assigned, and during the continuance of the said term in the declaration mentioned, to wit, on the 1st January, 1839, one *John Brock*, with force and arms, &c. entered into and upon the so demised premises, to wit, a certain outhouse, and a certain garden, and a certain court-yard, then respectively being parcel of the said demised premises, and then ejected, expelled, put out and amoved the defendant from the possession thereof, and kept and continued the defendant so ejected, and from thence hitherto, &c. &c. Averment: that the said *John Brock*, during all the time in this plea mentioned, had full and sufficient power and authority of and from the plaintiff to act in the manner and to the effect in this plea aforesaid. Verification.

Replication: de injuriâ suâ, &c. Special demurrer: that, as the plea did not admit the breaches, but shewed a state of facts and things existing before the committing of any of the breaches assigned, which relieved and exonerated the defendant from the further performances of his covenants, de injuriâ was not a good replication. Joinder.

M. Smith, in support of the demurrer. First, the plea is good. Although there are no authorities for pleading eviction by the lessor, in answer to the breaches of covenant assigned in this declaration, yet, by analogy to its adoption in an action on a breach of covenant to pay rent, it will afford a complete defence. Partial eviction by the lessor suspends his right of action on the covenant to pay rent. "If a man leases three acres, rendering rent, and the lessor ousts the lessee of one acre, he shall have an action of debt for no part;" *Walker's case* (a), *Dorrel v. Andrews* (b), *Neale v. Muckenzie* (c). Eviction is a good plea in bar, notwithstanding

(a) 3 Rep. 22 a. (b) Hob. 190. (c) 1 M. & W. 747.

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rupt of *Rubans Martin*. It was contended that the guarantie was therefore void under the stat. 6 *Geo.* 4, c. 16, s. 125 (a), and that that defence was admissible under the general issue (b) by the same section. Lord *Denman* nonsuited the plaintiff, reserving leave to him to move to enter a verdict. In the Michaelmas term following a rule was obtained accordingly; against which

Kelly and *Whitehurst* shewed cause (c). The transaction which the jury have found to have been the true consideration for this guarantie, comes within both the words and the spirit of the prohibition of the 125th section of the stat. 6 *Geo.* 4, c. 11. The object of it was to prevent the creditor being influenced by any thing in the nature of a bribe to sign the bankrupt's certificate, and pressing upon his defenceless condition for the purposes of extortion from him or persons disposed to assist him (d). A liberal construction has always been put upon it. The words of it differ but slightly from those of the stat. 5 *Geo.* 2, c. 30, s. 11, which avoids "every bond, bill, note, contract, agreement or security;" and on that it has been decided that a

(a) Which enacts, "That any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to consent to or sign such certificate, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable; and the party sued on such contract or security may plead the general issue, and give this act and the special matter in evidence."

(b) They also argued that at common law, and quite indepen-

dently of the legality or illegality of the consideration, the whole of it ought to be stated in the declaration, and that under the plea of non assumpsit it was an admissible defence that there was a fatal variance, in a material term, between the contract stated in the declaration and that which was proved. They cited *Wain v. Warlters*, 5 East, 10; *Clarke v. Gray and others*, 6 East, 564; *Saunders v. Wakefield*, 4 B. & Ald. 596.

(c) On Wednesday, Feb. 3rd, before Lord *Denman* C. J., *Littledale* and *Patteson* Js.

(d) See per *Heath* J. in *Sumner v. Brady*, 1 H. Bl. 656.

bond, given to a creditor of a bankrupt in order to induce him to withdraw a petition against the allowance of the certificate, was void. To the same effect are the cases of *Jones v. Barkley* (a), *Smith v. Bromley* (b); and Lord *Tenterden* ruled in accordance with them on the present stat. in *Birch v. Jervis* (c). To hold that the whole section is governed by the words "for securing the payment of any money," would be to defeat the obvious intention of the legislature, for that would be to limit the operation of it to contracts or securities for the payment of money; and it would be absurd to suppose the section did not mean to comprise a case by which value of any kind was obtained as a bribe to a creditor to do what he ought to do on his own unbiassed judgment, or where value of any kind was extorted as a condition for his doing it. Then, if so, is not the entering into a guarantee to pay for goods supplied by the creditor, in itself something of value? Not only is it usually considered so, but it would certainly be a good consideration in law as the foundation of another contract. Even, however, if the narrower construction of the section be adopted, this is within it, as a security for the payment of money. It cannot be material whether it is to be paid in a day or year,—whether to be paid absolutely or on condition; and, if the latter, whether the condition be more or less remote.

Cresswell and *Greenwood* contra. There was nothing whatever secured by this contract to *West* as an inducement to him to sign this certificate. There was nothing to bind *Martin* to purchase goods of *West*. When *Martin* required goods, and *West* supplied them, and not before, the consideration arose for the defendant's guarantie. The doctrine contended for on the other side would include cases and avoid contracts, certainly not in the contemplation of

(a) 2 Doug. 694 a, n. 3.

(c) 3 Car. & P. 379.

(b) Ibid.

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the legislature. It cannot make any difference that the goods were to be supplied to the person whose certificate was to be signed: it must be said that any guarantie would be avoided given under such circumstances for the payment of goods to be supplied by any person named to any other person named. Such instruments may be said to be obtained by pressure upon the kindness of friends of a bankrupt; but that ground of invalidating a contract was expressly repudiated by Lord *Ellenborough* (a): "All collateral security" (said his lordship) "may in some sense be said to be extorted from the benevolence of friends, without any impeachment of its validity." How can this be a contract or security within the statute, by which, when it was made, nobody was bound? Immediately after the certificate had been signed by *West*, the defendant, before any goods had been supplied, might have revoked the guarantee; *Mason v. Pritchard* (b). In the case of *The King v. The Inhabitants of Bourton upon Dunsmore* (c), which was a decision upon the stat. 8 Ann. c. 9, s. 39, requiring the true consideration to be stated in the indentures of a pauper, it was held to be no infringement of the statute that another sum had been paid in addition to that stated, there having been no valid contract to compel the payment of such additional sum.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This was an action on a written guarantie for the payment of the price of goods sold by plaintiff to one *Martin*. The plea was non assumpsit "by statute," under which the intended defence was, that the guarantie was

(a) In *Leinster v. Rose*, 4 East, 372.

(b) 12 East, 227. A case of *Sheppard v. Baker*, MS., a ruling of *Alderson* B. at the Somerset assizes in 1831, was also cited, in

which that learned judge ruled that "a man who gives a continuing guarantie is not therefore bound all his life; he may revoke it."

(c) 9 B. & C. 872; S. C. 4 M. & R. 631.

void, as given in contravention of the 125th section of the Bankrupt Act, to induce *West* the bankrupt, represented by the plaintiffs, to sign *Martin's* certificate. The fact was found by the jury, and satisfactorily proved at the trial, so that the guarantie was undoubtedly a contract to induce a creditor to sign the bankrupt's certificate ; but the question was, whether it was such a contract to that effect as the law intends. Much reliance was placed on the circumstance of *Martin* not having bound himself to deal with *West*, and on the revocable nature of the guarantie. These arguments have no weight, as the guarantie must have been considered as a beneficial contract by *West*, who exacted it as a consideration for signing the certificate. But as the act is directed against "any contract or security given by any bankrupt, or any other person, unto or in trust for any creditor, or for securing the payment of any money due by such bankrupt at his bankruptcy," the learned counsel contended that the contracts meant to be set aside must be taken to be of the same nature with those described. And as the contract is not only declared void, but "the money thereby secured or agreed to be paid shall not be recoverable," there appears to be some ground for maintaining that the only contracts affected are those by which money is "secured or agreed to be paid." Possibly, however, a guarantie for goods sold is to be considered as an agreement to pay money, though only in a certain event. But, without forming this opinion, we cannot avoid seeing the case to be within the very words of the statute, which we could not refuse to apply without encouraging such nice distinctions as render the law uncertain, and encourage experiments to evade its provisions.

Rule discharged.

G.

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1841.

Friday,
April 23rd.

A sold-note expressed, "18 pockets of hops at 100s."—Held, that parol evidence was admissible to shew that the 100s. meant the price per cwt.

SPICER v. COOPER.

ASSUMPSIT. The declaration stated that the plaintiff, at the request of the defendant, bargained to buy of him, and the defendant then sold to the plaintiff divers goods, to wit, 18 pockets of Kent hops, at the price of 5*l.* for each cwt., to be delivered within a reasonable time, and paid for at three months' credit. The breach alleged was the non-delivery. The first plea was non-assumpsit. At the trial before *Tindal* C. J. at the last assizes for the county of Cambridge, a sold-note, signed by the defendant in the following form, was given in evidence:—

"Sold to Mr. *Waite Spicer*, of S. Walden,
18 po^r Kent Hops as under, July 23d, 1840.
10 po^r Burton East Kent, 1839 }
8 po^r Springall Goodhurst Kent, 1839 } at 100s.
delivered.

Q^r allowances and 3 mos. credit.

John Cooper."

On the part of the plaintiff it was contended that the price of 100s. mentioned was well understood in the trade to be referrible to the price per cwt.; and evidence was offered to prove that this contract would be so understood, and that it was customary in the trade to make contracts in this form with such meaning. The defendant contended that the evidence was inadmissible; that either the contract was insufficient as not stating a price at all, or that the price mentioned must be taken on the face of the contract to refer to the price per pocket. The learned judge admitted the evidence, reserving leave to the defendant to move to enter a nonsuit. The plaintiff had a verdict.

Kelly moved (a) to enter a nonsuit pursuant to the leave reserved. The evidence was inadmissible to shew that the price mentioned referred to the price per cwt. [Lord Den-

(a) On Wednesday, April 21st, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

man C. J. Does the question arise at all in this case? Suppose this was a contract for so many butts of beer at one shilling, the ordinary price of a gallon?] Then it would be a material question whether the price, a material term, would appear at all, and, if not, if that could appear only by parol evidence, there would not be a sufficient note in writing to satisfy the Statute of Frauds: *Goss v. Lord Nugent* (a), *Stead v. Dawber* (b). The case of *Greaves v. Ashlin* (c) is precisely in point. Lord *Ellenborough* there ruled that in an action for a sale of corn on a written contract, which was silent as to the time of delivery, parol evidence to prove the time agreed upon was inadmissible; and his lordship was likewise of opinion "that a witness could not be asked whether, according to the usage of the corn market, if corn were sold to be delivered at a distant day, the time should not be inserted in the contract, as that was only an indirect method of giving parol evidence to vary the written contract."

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Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—We are of opinion that in this case the evidence was admissible. It was admissible to shew what the writing meant, considered as a short or incomplete note of the contract; or if it be considered a complete document, if the price referred, as has been contended, to the term "pocket," mentioned before, then the evidence would be admissible to shew what was meant by that term in such a mercantile contract.

Rule refused.

(a) 5 B. & Ad. 58; S. C. 2 N. & M. 28.

(b) 2 P. & D. 447.

(c) 3 Camp. 426.

1841.

Monday,

May 10th.

The 1 Will. 4, c. 18, s. 2, "provided always that, where the yearly rent shall exceed 10*l.*, payment to the amount of 10*l.* shall be deemed sufficient for gaining a settlement under the said recited act," (6 Geo. 4, c. 57,) dispenses with payment of the whole year's rent in settlement by payment of rates as well as in settlement by renting a tenement.

The QUEEN v. The Inhabitants of BRIGHTON.

ON appeal against an order of Justices for the removal of *Ann Richardson* and her two children from the parish of Petworth to the parish of Brighton, both in the county of Sussex, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The pauper, *Ann Richardson*, was the widow of one *Joseph Richardson*. On the 27th or 28th of March, 1838, the said *Joseph Richardson* went into the occupation of a separate and distinct dwelling-house and buildings in the parish of Brighton, under a lease for a term of years, and continued with his family to occupy those premises till his death on the 27th of March following. During this time he paid the first three quarters of a year's rent for the premises, amounting to more than 10*l.* (viz. 80*l.*), but the last *quarter of a year's rent was never paid*. He underlet a portion of the premises, but was duly assessed in respect of the whole of them to a rate made for the relief of the poor of the parish of Brighton on the 17th of July, 1838, (the first rate made after his occupation,) and to another such rate made on the 1st November, 1838, and these two rates were duly paid by him, together with the sum of 1*l.* 14*s.* 1*d.* apportioned to him, the said *Joseph Richardson*, out of a rate made in respect of the said premises, on the 5th March, 1838, and assessed upon the then occupiers of the said premises previously to the occupation of him the said *Joseph Richardson*. No other rate was made for the said parish in respect of the said premises during the occupation of the said *Joseph Richardson*. The sessions find as a fact that the said *Joseph Richardson* occupied the said premises for the space of one whole year.

For the respondent parish it was urged, that the defect in the payment of the whole year's rent was cured by the operation of the 1 Will. 4, c. 18, s. 2, and that then the said *Joseph Richardson* acquired a settlement in the parish of Brighton by having paid the rates aforesaid.

For the appellant parish it was contended that the operation of 1 *Will.* 4, c. 18, was confined to settlements by renting tenements. That settlements by paying parochial rates and taxes were still regulated by 6 *Geo.* 4, c. 57, independently of the statute 1 *Will.* 4, c. 18, and that the provisions of the former statute not having been complied with, inasmuch as the whole year's rent had not been paid, no settlement was obtained by the said *Joseph Richardson* having paid the said rates.

The question for the opinion of this Court is, whether the said *Joseph Richardson* did gain a settlement in the parish of Brighton by the payment of the said rates under the circumstances above stated. If the Court shall be of opinion that he did, then the order of sessions is to be confirmed. If, on the contrary, the Court shall be of opinion that he did not, then the order of sessions is to be quashed.

Johnson J. J. in support of the order of sessions. The question turns upon the construction to be put upon the second section of 1 *Will.* 4, c. 18, when taken in connection with the 6 *Geo.* 4, c. 57,—whether that section is available as well for the purposes of settlement by payment of rates and taxes as of settlement by the renting of tenements. On the other side it will be contended that it is restricted to the latter branch of settlement alone, and recourse will be had to the title in support of that view. The title of the act is, “An Act to explain and amend an Act of 6 *Geo.* 4, as far as regards the Settlement of the Poor by the *renting and occupation of Tenements.*” The first section recites the qualifications introduced by the 6 *Geo.* 4 into *both* kinds of settlement, viz. (inter alia) that the rent to the amount of 10*l.* should be paid for one *whole* year at the least, and then, in its enacting part, directs itself solely to settlement by renting, and superadds to that kind of settlement the further qualification that the tenement must be actually occupied for a year. The second section

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is, "provided always, and be it further enacted, that where the yearly rent shall exceed 10*l.*, payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the said recited act." The language of this section is equally applicable to both kinds of settlement, and the title itself also may well refer to both settlements, for "the renting and occupation of-tenements" therein mentioned were properties annexed to the settlement by payment of rates by the very act of 6 *Geo.* 4, which was to be amended. But it is unnecessary to contest that point, for the title is no part of the act, *Chance v. Adams* (a); nor can it restrain its operation, *Mortimer v. McCallan* (b). The scope of the act itself, as well as the words in the operative part of it, will be found comprehensive enough to embrace both branches of settlement. It first recites the operation of the 6 *Geo.* 4 upon both kinds of settlement. It then recites that doubts had arisen with respect to the amount of rent to be paid under that act, still evidently with a view to both species of settlement. Then comes the first section, which is restricted in its terms to the settlement by renting a tenement, and lastly follows the section in question, which is general, that "where the rent shall exceed 10*l.*," that is to say (it is submitted), in all cases where doubts have arisen as to the amount of rent to be paid for the purpose of conferring either kind of settlement, and that rent shall exceed 10*l.* in amount reserved, "payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement under the said recited act."

Bates v. Pilling (c) may be cited to shew the opinion of *Bayley J.* that reference may be had to the title of an act of parliament in order to explain any ambiguity, and that statutes should receive a literal construction. That is not disputed; but here is no ambiguity, and a *literal* construction is all that is contended for. In that case too effect was given to the general operative words of the 43 *Geo.* 3,

(a) 1 *Ld. Raym.* 77.

(b) 7 *M. & W.* 37.

(c) 2 *C. & M.* 374.

c. 46, without regard to the restrictive words of the title. The title was simply for the more effectual prevention of vexatious "arrests," and yet it was held there, and also in the case of *Bennett v. Burton* (a) lately, before Coleridge J. in the Bail Court, that a party must be both arrested *and held to special bail*, in accordance with the express words in the third section, before he can call the statute in aid.

(He was then stopped by the Court.)

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Tyndale and *Attree* contra. The second section of the 1 Will. 4, c. 18, does not extend to settlements by paying parochial rates, but is confined to settlements by renting only. The expressions contained in the title refer only to the latter branch of settlement, and the title may be used to assist in the exposition of the statute itself: *Bates v. Pilling* (b), above referred to, *Free v. Burgoyne* (c), *Morris v. Mellin* (d). In the title to the 6 Geo. 4, c. 57, both modes of settlement are mentioned, and the omission in the act now under consideration is evidently designed to exclude the settlement by payment of parochial rates. In the case of *Rex v. Inhabitants of St. John Bedwardine* (e) this Court decided on the 56 Geo. 3, c. 139, s. 11, (the parish apprentice act,) that a general clause following a number of other clauses, all directed to a particular object, would be restrained to that object, and not allowed an extended meaning. The whole force of the first section is exhausted on the subject of settlements by renting, and that section has been held (f) to apply only to that mode of settlement. The second section is only a proviso to the former, and is therefore dependent upon, and cannot extend beyond it, *Dwarris* on Stat. vol. 2, 764. In *Rex v. Dursley* (g) the point here raised may be said to have received a judicial decision, for

(a) Not reported.

(b) 2 C. & M. 374.

(c) 2 Bligh, N. S. 65.

(d) 6 B. & C. 446; 9 D. & R.
 503.

(e) 5 B. & Ad. 169; S. C. 2 N.
 & M. 86.

(f) In *Rex v. Stoke Damarel*, 1
 N. & P. 453.

(g) 3 B. & Ad. 465.

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it was there said that, unless the 2d section of 1 *Will.* 4, were held to be retrospective, it would be without object and add nothing to the former; but, if the interpretation now contended for is to prevail, it would add a whole class of settlements to those affected by the first section; indeed the first section would become almost nugatory. It is clear, therefore, that the legislature intended to restrict the operation of this act of parliament to the settlement by renting only.

LORD DENMAN C. J.—I do not find the intention to restrict, and I think the section was meant to apply to both kinds of settlement.

PATTESON J.—The 6 *Geo.* 4 provides for the one mode of settlement as well as the other, and the words in the second section are, “payment to the amount of 10*l.* shall be deemed sufficient for the purpose of gaining a settlement *under the said recited act.*” That would include the settlement by payment of rates.

WILLIAMS J. concurred.

D.

Order of Sessions confirmed.

Tuesday,
 Apr. 20th.

FORSTER v. COOKSON, Esq.

Under a writ
 of fieri facias
 the sheriff levied on and

CASE against the sheriff for not paying a year's rent on levying goods under a fi. fa. on the premises of the plaintiff's removed goods not the property of the judgment debtor. The owner recovered by action the whole proceeds of the levy. Before the removal of the goods from the premises on which they were, the sheriff had notice of a year's rent being due, which he did not pay:—Held, notwithstanding the sheriff had paid the whole proceeds of the levy to the owner of the goods, that he was liable under the stat. 8 *Ann.* c. 14, s. 1, for removing the goods without paying the rent.

In an action under that statute against a sheriff for removing goods without paying the year's rent due to the landlord, it is no ground for arresting the judgment that the declaration does not shew whose goods the levy was made upon, if it appear that they were on the demised premises.

tenant. The declaration stated that a year's rent, to wit, the sum of 34*l.*, was due to the plaintiff for a certain messuage demised by him to one *Sarah Wright*, that during the continuance of the said demise, to wit, on the 6th day of May, in the year of our Lord 1838, the defendant then being sheriff of the said county of Northumberland, by virtue of and under pretence of a certain writ of our lady the queen, called a fieri facias, before then issued against a certain person, to wit, one *Sarah Wright*, at the suit of one *Harrison Colbeck*, and directed to the said sheriff of the said county of Northumberland, took certain goods and chattels, then being in and upon the said messuage and tenements, with the appurtenances so demised by the plaintiff as aforesaid, to wit, beyond the amount of the said arrears of rent so due and owing to the plaintiff as aforesaid, that is to say, to the amount or sum of 50*l.* The declaration then alleged notice of rent being due, and removal of the goods by the defendant without paying any rent. The fifth plea was, "that the defendant did not, during the said demise, take the goods and chattels in the said declaration mentioned, or any of them, in or upon the said messuage or tenements with the appurtenances in the said declaration mentioned, in manner and form as the said plaintiff alleged." At the trial before *Rolfe B.* at the last assizes for the county of Northumberland, the case appeared to be that one *James Wright* had been tenant of certain premises to the plaintiff, that he died in July, 1837, and the widow *Sarah Wright* continued in possession of the premises, but without administration, administration of the goods of *James Wright* having been granted to a creditor named *Elliott*. In April, 1838, a writ of fi. fa. was issued against the goods of *Sarah Wright*, and under it, on the 6th of May, the defendant levied on the goods of the administrator then on the premises, which was the levy complained of. The administrator afterwards brought an action against the defendant for this wrongful levy, and recovered the whole proceeds of the

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execution. It was objected on the part of the defendant that on these facts it must be taken that there never had been any levy of the goods of *Sarah Wright* at all, but only a tortious taking of the goods of the administrator, and, the levy therefore being eventually inoperative, there was no right of action for not paying the year's rent. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict.

Knowles now moved accordingly. The plea traverses the taking under the writ *modo et formâ*, and the virtue *cujus* therefore was in issue. The declaration alleges a taking under a writ against *Sarah Wright*, but the event of the proceedings shews the taking to have been altogether tortious, and one which made the sheriff liable as a trespasser. It cannot be said, therefore, that there was any taking "by virtue of any execution" within the meaning of the stat. 8 *Ann. c. 14, s. 1 (a)*, on which this action depends.

(a) "For the more easy and effectual recovery of rents reserved on leases for life or lives, term of years, at will, or otherwise, be it enacted by the queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in parliament assembled, and by the authority of the same, that from and after the first day of May, which shall be in the year of our Lord one thousand seven hundred and ten, no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years, at will, or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such

goods from off the said premises, by virtue of such execution or extent, pay to the landlord of the said premises, or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking such goods or chattels by virtue of such execution; provided the said arrears of rent do not amount to more than one year's rent; and, in case the said arrears shall exceed one year's rent, then the said party, at whose suit such execution is sued out, paying the said landlord, or his bailiff, one year's rent, may proceed to execute his judgment, as he might have done before the making of this act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money."

In *Lee v. Lopes* (a) an execution was levied after the defendant had become bankrupt, and when the property in the goods had passed from him to his assignee, and in an action by him against the sheriff, it was held that he had no right after notice of the commission to pay over any rent to the landlord; and Lord *Ellenborough* said "here the sheriff has taken in execution the goods of the assignee instead of the goods of the tenant. How then can he have a right to retain out of that fund which he had no right to take, or how can the landlord claim his rent out of the hands of a wrong-doer?" So in *Taylor v. Lanyon* (b) the defendant was in the double capacity of landlord and execution creditor, and having, in his latter capacity, issued a writ of *fi. fa.*, under which the sheriff levied and paid over a year's rent to the defendant, at a time when the goods were protected by the insolvent act from the defendant's execution, it was held the insolvent's assignees might recover back from the defendant the year's rent so paid to him by the sheriff. It was argued in both these cases, as it was here, that the landlord ought to have a year's rent as he had lost his distress. If the goods had been removed without any colour of law, the landlord would have lost his distress, and this seizure has been without any authority of a legal writ. [*Patteson J.* The landlord has a right to his year's rent be the goods whose they may. The sheriff has done the landlord all the mischief he could have done if he had made a valid levy.] The landlord's right depends upon the statute. [*Patteson J.* The declaration does not allege a taking of the goods of *Sarah Wright*.] It does not allege anything about the property in the goods. The declaration, therefore, is insufficient, and no judgment can be given upon it, or if it must be intended to be sufficient, it was not proved. There was nothing in the allegation or in the proof to shew any right to take these goods by virtue of an execution. [*Patteson J.* Can the defendant

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(a) 15 East, 230.

(b) 6 Bing. 536; S. C. 4 M. & P. 316.

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himself, after in fact taking these goods under the writ of execution, say that he did not take them by virtue of it?

Lord DENMAN C. J. There is no ground for a rule; the declaration was sufficient, and it has been proved.

PATTESON, WILLIAMS, and WIGHTMAN, Js. concurred.

G.

Rule refused.

Tuesday,
 May 4th.

JONES v. REYNOLDS.

The following letters held to constitute an agreement only, and not a demise from plaintiff to defendant.

On 21st February, 1825, defendant wrote to plaintiff, "I shall be happy to take a lease of your iron ore at a royalty of 1s. per ton, and I will engage to work the several veins of ironstone, limestone, ore, and manganese, in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores (which I believe to be about 40 per cent.), the term to be 40 years from the 24th June next, and the sleeping rent 150*l.* per annum. The relative proportion of the iron ores in weight to be worked together to be ascertained by a competent person."

THIS was an action of assumpsit for the use and occupation of an undivided third part of certain uninclosed common waste lands called Newton Down, in the parish of Newton Nottage, in the city of Glamorgan, and, after issue joined on non-assumpsit, turned into a special case, the material statements of which were as follows:—

Before and at the respective dates of the instruments of the 21st February, 1825, and the 4th April, 1825, the plaintiff was seised of the entirety of certain inclosed lands, and minerals under the same, in the parish of Newton Nottage in Glamorganshire; and also of an undivided third part of certain uninclosed common or waste lands called Newton Down in the same parish, and of the ironstone, limestone, and ore, and minerals under the same, as tenant in common with Colonel *Knight*, who was seised of the remaining two-thirds thereof.

On the 21st February, 1825, the defendant wrote to the plaintiff in the following terms:—

"I shall be happy to take a lease of your iron ore at Newton at a royalty of 1s. per ton, and I will engage to work the several veins of ironstone, limestone, ore, and manganese in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores of South Wales (which I believe to be about forty per cent.), the term to be forty years from the 24th June next, and the

Plaintiff wrote to defendant in answer,—“I agree to the terms contained in your letter. I shall be ready to grant a lease conformable thereto.”

sleeping rent 150*l*. per annum. The lease to be voidable on the part of the lessee by giving six months' notice, and paying one year's rent as a fine if given within the first two years, and 500*l*. as a fine if the lease be determinable by lessee at any subsequent time. The relative proportion of the iron ores in weight to be worked together to be ascertained by a competent person. (Signed &c.) *J. Reynolds.*"

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The plaintiff within a few days returned the following answer, with a copy of the preceding letter:—

"I agree to the terms contained in your letter copied on the other side, and shall be ready to grant a lease conformable thereto, from myself and all other proper parties whenever you require me.

(Signed, &c.) *C. R. Jones.*"

After these letters had passed, a doubt arose whether they should be construed to comprehend the minerals of the undivided third part of the plaintiff in the common or waste lands, whereof he was tenant in common with Colonel *Knight*, as well as the land and minerals whereof the plaintiff was seised of the entirety; and (in order to clear up that doubt) the defendant, on the 4th of April, 1825, signed another instrument, as follows, which was written on the same paper with that of the 21st February, 1825:—

"Memorandum, 4th April.—I propose to take a lease of the minerals above described, lying in the lands of which you are joint proprietor with Colonel *Knight*, on the terms above mentioned for your exclusive property. (Signed, &c.) *J. Reynolds.*"

On the same 4th April, 1825, the plaintiff wrote on the same paper the following words:—

"I agree to let Mr. *Reynolds* a lease of my joint property on the same terms I have granted him a lease of my independent property, commencing at the same time, and paying the same sleeping rent and the same royalty per ton. (Signed, &c.) *C. R. Jones.*"

"*J. Reynolds, Esq.*"

In May, 1825, the plaintiff's attorney tendered to the defendant's attorney a lease of the minerals comprised in the several instruments of the 21st February and 4th April, but it was rejected, on the ground that Colonel *Knight* was not made a party to it, and that it did not pass a separate interest in any portion of the common lands.

On the 24th June, 1827, the defendant determined his

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interest in the minerals, to which the plaintiff was entitled in severalty, having given six months' notice, and having paid rent up to that time, for which the defendant gave this receipt :

" Received of, &c. 100*l.* being all the rent that will be due to me on the 9th of June next, for the iron mine under my separate property at Newton, under an agreement for a lease thereof."

On the 20th June, 1836, the plaintiff was served by the defendant with the following notice :

" I hereby give you notice that I shall quit and deliver up on the 24th June, 1837, all and singular the mines, lands, and premises situate in the parish of Newton Nottage, or elsewhere, in the county of Glamorgan, of which I am, or am deemed by law, to be in the possession or occupation as your tenant.
 (Signed) *J. Reynolds.*"

No offer has been made by the defendant to pay the fine of 500*l.*, mentioned in the agreement of the 21st Feb. 1825, but the defendant has paid the rent which accrued due up to 24th June, 1837, the expiration of the notice to quit.

The present action is for the use and occupation of one-third of the lands and minerals at Newton Down, from the 24th June, 1837, to the 24th June, 1838, and the plaintiff seeks to recover as damages 150*l.*, being one year's rent mentioned in the writing of the 21st February, 1825.

If the Court shall be of opinion that the plaintiff is entitled to recover in this action, judgment is to be entered for him for 150*l.* damages, besides costs ; but if the Court shall be of opinion that the plaintiff is not entitled to recover, judgment is to be entered for the defendant.

The points marked for argument by the plaintiff were, 1st. That the agreement of the 4th April, 1825, (incorporated with that of the 21st February) amounts to an actual demise. 2dly. That, at all events, the tenant holding under that agreement, could not determine his tenancy after the expiration of the first two years without the payment of 500*l.* as a fine or penalty.

For the defendant, that the instrument dated the 4th April, 1825, coupled with that dated 21st February, constitute at most merely an agreement for a lease, and that if any relation of landlord and tenant ever existed between the

parties it was merely that of a tenancy from year to year, which was determined by notice to quit, so as to preclude the further demand for constructive use and occupation made in this action."

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Chilton for the plaintiff. The question in this case was decided between the same parties in *Jones v. Reynolds* (a), where the Court said that the right to take the minerals was "expressly demised." The letters and indorsements contain all the essential ingredients of a lease, viz. the commencement of the term, the duration of it, the rent to be paid, and the conditions to be observed. The cases on the construction of these instruments are conflicting; but the general principle to be extracted from them is, that if the instrument contains words of present demise, a stipulation for a future lease to be granted will not prevent its operation as an actual demise. The cases are collected in *Bac. Abr. (Leases)* K. Then, are there words of present demise here? In *Maldon's* case (b), which has been frequently recognised, a parol agreement in these words, "You shall have a lease of my lands &c. for 21 years, paying therefore 10s. per annum; make a lease in writing and I will seal it," was held to be a good parol lease. That case is not distinguishable from the present. So, in *Baxter v. Browne* (c), an agreement by two persons "with all convenient speed to grant a lease, &c. and they did thereby set and let," was held to be a lease in presenti with an agreement for a more formal lease in futuro. *Poole v. Bentley* (d), *Pinero v. Judson* (e), and *Warman v. Faithful* (f), are to the same effect.

Here, a future lease is to be granted "if required." The agreement for a lease left nothing unascertained in the terms of the actual demise, as in *Doe d. Pearson v. Ries* (g)

(a) 4 A. & E. 805; S. C. 6 N. & M. 441.

(b) Cro. Eliz. 33.

(c) 2 W. Bl. 973.


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(d) 12 East, 168.

(e) 6 Bingh. 206.

(f) 3 N. & M. 137.

(g) 8 Bingh. 178.

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and *Doe d. Phillips v. Benjamin* (a). In *Chapman v. Bluck* (b), which is an authority for the plaintiff on the construction to be put on the words of this agreement, the Court held that the subsequent conduct of the parties was admissible to shew their intention at the time of making the contract. Here the defendant has occupied the demised land for fourteen years, and has paid rent.

Sir *W. W. Follett* contra. The defendant, during the time in question, has had no actual occupation, nor has he taken any minerals: this action is brought for the sleeping rent. The plaintiff cannot recover, unless there was an actual demise. The agreement was treated by him as executory only; he afterwards tendered a lease. The Court will look at the instruments themselves. In the first letter dated the 21st February the relative proportion of the ores to be worked together was left unascertained. That was a material defect. In *Doe d. Morgan v. Bissell* (c), which is a leading case, though words of present demise were used, the Court held the agreement executory only, because it could not be the intention of the parties that it should operate as a lease, if the terms on which the tenant should hold were not previously ascertained; "we must therefore presume that they meant to have a further lease, and then, according to the doctrine of the modern cases, no present interest is conveyed under this instrument," per *Mansfield* C. J. It is difficult to reconcile all the cases. Some have proceeded on the distinction that there are both words of actual demise, *and* an agreement for a future lease; but, as a general rule, if it appears on the face of the instrument that the one party intended to be bound as lessor, and the other as lessee, and there are words of present demise and the terms are stated, the Court will construe it as a lease. In *Baxter v. Browne* (d) and *Poole v. Bent-*


(a) 9 A. & E. 644; S. C. 1 P. & D. 440.

(b) 5 Scott, 515.

(c) 3 Taunt. 65.

(d) 2 W. Bl. 973.

ley (a) there were both terms of actual demise, and an agreement for a lease; that distinction will reconcile many of the authorities. *Maldon's* case was before the Statute of Frauds. In the present agreement the words are entirely prospective. The defendant "proposes to take a lease," and the plaintiff agrees "to let a lease," on the same terms as for his exclusive property, but neither the premises nor the terms nor the particular minerals are defined. It is contended that the plaintiff may recover in this action for use and occupation of the joint property as in *Jones v. Reynolds* (b). He recovered in the same form of action for the property mentioned in the letter of the 21st February and the reply, which were considered an actual demise. [*Patteson J.* There the jury found that the defendant had occupied the land demised, and the Court would not disturb the verdict.] The jury merely found that an interest vested in the defendant by the agreement, upon which an action of use and occupation could be grounded, and the Court thought that a permission to dig ore, if actually demised and "actually exercised," might be a hereditament. But there is no such finding in the present case, nor any actual exercise, and that decision, therefore, is not an authority for the present action. The defendant has not occupied, and the agreement vested in him no right to the possession, until a lease was executed: *Bicknell v. Hood* (c), *Brashier v. Jackson* (d). In *Chapman v. Towner* (e), where there was an agreement to let and to take for 21 years, and an occupation and payment of rent, the Court held that the agreement was not an actual demise, and that the defendant was only tenant from year to year.

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Chilton in reply. Occupation is not necessary to make the defendant liable in this action, if there was an actual demise, and *Chapman v. Bluck* (f) is a decisive authority that

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|-----------------------------------------|--------------------|
| (a) 12 East, 168. | (d) 6 M. & W. 549. |
| (b) 4 A. & E. 305; S. C. 6 N. & M. 441. | (e) 6 M. & W. 100. |
| (c) 5 M. & W. 104. | (f) 5 Scott, 515. |

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there was. The doctrine laid down in *Doe d. Morgan v. Bissell* (a) no longer prevails. In ordinary language "a lease doth properly signify a demise or letting of lands, rent, common, or any hereditament (b)." No precise form is necessary. In *Chapman v. Towner* (c) the agreement did not state the terms of the demise; and in *Brashier v. Jackson* (d) there were no words of present demise. It is difficult to reconcile *Bicknell v. Hood* (e) with the other cases.

Lord DENMAN C. J.—I feel no doubt on the question. The letter of the defendant offering to take a lease on terms, and the reply agreeing to the terms contained in that letter, do not amount to a present demise. The case steers clear of the difficulties to be found in the former cases; the terms of the agreement are only in futuro. Much remained to be done before either party could call this a lease. In the first letter the defendant offers to take a lease and to work the several veins of ironstone and other minerals, in relative proportions not exceeding the usual average in South Wales, which he believes to be about 40 per cent.; and the relative proportions are to be ascertained by a competent person. Until that ascertainment was made to the satisfaction of both parties, no terms existed on which the defendant could work the veins. The acceptance by the plaintiff is of the terms proposed, which were left indefinite. The agreement was quite insufficient to warrant any entry by the defendant as on an actual demise; nor would it, in my opinion, support an application to a Court of equity for a specific performance. This decision leaves the cases untouched. It is clear that there was no actual demise.

PATTESON J.—The cases on this subject might perhaps be reconciled if they were carefully considered; but I cannot pretend to do it, nor is it necessary in this case. It is

(a) 3 Taunt. 65.

(d) 6 M. & W. 509.

(b) Shepp. Touchst. c. 14.

(e) 5 M. & W. 104.

(c) 6 M. & W. 100.

quite clear that the words used by these parties amount to an agreement only. In all the cases where such instruments have been construed as a lease, there were either words of present demise, or both the parties contemplated that possession should be taken, and the relation of landlord and tenant should commence before the final lease was executed: but neither occurred here. The defendant's letter was written on the 21st February, and the term of forty years was not to commence until the 24th June, and no agreement was made as to the possession in the interval. Then follows a proviso for making void the lease to be granted, on notice, and for ascertaining the relative proportion of the ores by a competent person. In fact, the terms were not then stated; something remained to be done. In *Pinero v. Judson (a)* and *Chapman v. Bluck (b)* the lease was to commence from a day then past.

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WILLIAMS J.—It is unnecessary to examine the cases in detail, but this principle would probably be extracted from them all, that unless there is something on the face of the instrument to shew an intention in the parties to give possession, and to create the immediate relation of landlord and tenant, it is an agreement only and not an actual demise. In the letter of the 21st February, instead of that immediate relation, everything is prospective—the time and the ascertainment of the time. There is nothing like a present demise.

WIGHTMAN J.—I agree that a stipulation for a future lease will not convert an actual demise into an agreement merely; the future lease being referred to sometimes as to a more formal instrument only. In *Doe d. Morgan v. Bissell (c)* Mr. Justice Lawrence said, “Where there is an instrument by which it appears that one party is to give possession and the other to take it, that is a lease, unless it can be collected from the instrument itself that it is an

(a) 6 Bing. 206.

(b) 5 Scott, 515.

(c) 3 Taunt. 67.

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agreement only for a lease to be afterwards made." In this case there are no words of immediate demise or giving immediate right of possession. The agreement is for a lease for forty years from the 24th June then next, and the mode of working is to be ascertained before the terms are complete. The case falls within the distinction in *Doe d. Morgan v. Bissell* (a). In *John v. Jenkins* (b), where there was a subsisting tenancy and a written agreement to let the farm to the tenant on different terms, the amount of the rent to be settled by valuation and sureties for it to be found, it was held that though the agreement contained words of present demise, yet as the rent was not settled and the sureties not found, the agreement did not operate as a lease.

Judgment for defendant.

(a) 3 Taunt. 65.

(b) 8 Taunt. 65.

Thursday,
May 6th.

A lessee for years of a copyholder may maintain ejectment, though there be no custom in the manor to lease, and no licence has been obtained from the lord, such lease being good between the parties to it, and void only as against the lord.

DOE on the several demises of TRESSIDDER and others
v. TRESSIDDER.

EJECTMENT. At the trial before *Wightman J.*, at the last assizes for the county of Cornwall, it appeared that the land sought to be recovered was copyhold of the manor of Helston, in Kirrier, in the county of Cornwall. The premises had been conveyed by way of mortgage to *John Borlase*, and he had been duly admitted. On the part of the lessors of the plaintiff, title was made under a lease from *Borlase*, from six years to six years, if certain persons named should so long live. It was objected, on the part of the defendant, that without the licence of the lord, or a special custom, a copyholder could not make a lease of his tenement for a longer period than a year; that no licence or special custom was proved; and that the attempt to make such a lease was a forfeiture, and therefore conferred no

title on the intended lessee. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict.

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M. Smith moved accordingly (*a*). A lease of a copyhold tenement beyond the term of a year, except by a special custom, is a forfeiture, which may however be obviated by the lord's licence, operating as a dispensation of a forfeiture. There is some conflict among the authorities as to the effect of such a lease, in conferring upon the lessee of the copyholder a right to maintain an ejectment; but the preponderance of authority is in favour of the proposition, that not only can the lord take advantage of such a forfeiture, but that no title passes to the lessee, the lord being in without any presentment by the homage. It was held in *East v. Harding* (*b*), that the mere making of a lease was a forfeiture, though to commence at a future day, and though the lessee had not entered. It was "adjudged," in *Page v. Smith* (*c*), "that when a copyhold is forfeited, the lord may grant it without a seizure, for the forfeiture is a determination of the will of the party, and the lord is in as of his reversion." It is also laid down by *Tracey J.*, B. N. P. 107, that in the case of a forfeiture a presentment need not be proved. In *Jackson v. Neal* (*d*), it was expressly held that ejectment would not lie on such a lease. This position is also supported by the cases of *Wells v. Partridge* (*e*), *Erish v. Rives* (*f*), *Petty v. Evans* (*g*). In *Goodwin v. Longhurst* (*h*) it certainly appears to have been said by the Court, that a lease by a copyholder is good between the parties, though bad against the lord, but that was merely a dictum, for the decision of the Court was, that the lease was well made,

(*a*) On Tuesday, April 20, before Lord Denman C. J., *Patteson, Williams and Wightman Js.*

(*b*) Cro. Eliz. 498.

(*c*) 3 Salk. 99.

(*d*) Cro. Eliz. 395.

(*e*) Cro. Eliz. 469.

(*f*) Cro. Eliz., 5th point, 717, where it was doubted whether it lay, even if the lease were made according to the custom of the manor.

(*g*) 2 Brownlow, 40.

(*h*) Cro. Eliz. 535.

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according to the lord's licence. There is certainly a resolution reported in *Downingham's case*(a), which is in direct opposition to the present argument. The text books however seem to be the other way. In *Adams on Ejectment*(b) it is laid down, that "when the lessor of the plaintiff is the lessee for years of a copyholder, he must, after proving his lessor's title, shew either a special custom in the manor, allowing the copyholder to make leases for years, or that the licence of the lord was obtained before the lease was granted."

*Cur. adv. vult.*

Lord DENMAN C. J. delivered the judgment of the Court.—There is certainly some conflict in the authorities on the point in this case, but we are of opinion that the case in *Owen's Reports*(c), referred to on the motion, which is exactly in point, is good law. It was there resolved, "That if a copyholder made a lease for years, which is not according to the custom of the manor, yet his lease is good, so that the lessee may maintain an *ejectione firmæ*, for between the lessor and lessee, and all others, except the lord of the manor, the lease is good, and so hath it been several times adjudged in this Court."

G.

Rule refused.

(a) *Owen*, 17.

30; which however do not appear

(b) 3d ed., 309, citing *Co. Copy.*

to support the proposition.

§ 51, 52; *Watkins on Copyholds*,

(c) *Downingham's case*.

*Thursday,*  
*April 22d.*

The comprehensiveness of the general issue by statute is not affected by the new rules of pleading.

ROSS *v.* CLIFTON and another.

**WARREN** obtained a rule to shew cause why he should not be allowed to add the words "by statute" to the general issue pleaded in this case, for the purpose of giving evidence under it of certain matters of defence under the Building Act, 14 Geo. 3, c. 78.

This was an action on the case by a reversioner for an injury to his messuage &c.

The first count of the declaration stated that at the time when &c. a dwelling-house of which the plaintiff was reversioner, was in the possession of one *J. T.* as tenant to the plaintiff, and complained that the defendants had wrongfully, by bricks and other building materials, obstructed a drain, which the plaintiff had a right to use, running from his house to the common sewer.

The second count complained that the defendants by laying bricks and other building materials on a wall of the house had prevented the rain from being carried off, as of right it ought, from the top of the house into a certain watercourse.

In addition to the plea of not guilty to the whole declaration, the defendants had pleaded specially to the first count, 1. a traverse of the tenancy to the plaintiff and of the plaintiff's reversion. 2. The same plea to the second count. 3. To the first count a traverse of the right to use the drain as alleged. 4. To the second count a traverse of the right for the rain to be carried off as alleged; and 5. A traverse that the wall was part and parcel of the plaintiff's house.

*Shee Serjt.* and *M. Chambers* now shewed cause (*a*). The defendant ought not to be allowed to plead the general issue "by statute" and also his special pleas. The matters of defence contained in his special pleas would be admissible in evidence under not guilty "by statute," for the new rules have not affected such a plea, which is exempted from their operation by the proviso in 4 & 5 *Will.* 4, c. 42, s. 1: *Neale v. M'Kenzie* (*b*), *Fisher v. Thames Junction Railway Company* (*c*), *Haine v. Davey* (*d*), and *Legge v. Boyd* (*e*);

(*a*) Before Lord Denman C. J.  
*Patteson, Williams, and Coleridge*  
Js.

(*b*) 1 C. M. & R. 61.

(*c*) 5 Dowl. P. C. 773.

(*d*) 4 A. & E. 892; S. C. 6 N.  
& M. 356.

(*e*) 9 Dowl. P. C. 39; S. C. 19  
Law Journ. N. S. (C. P.) 19.

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the last of which cases shews that the Court, in their discretion under the statute of *Anne*, would not allow these special pleas to stand together with not guilty "by statute." There may be defences, as in *Wells v. Ody* (a), which would not be evidence under the statutable not guilty, but no such defence is set up in the present case.

*Warren* contra. Special pleas, containing defences admissible under the statutable general issue, are by no means unusual: *Twigg v. Potts* (b), and *Hooker v. Nye* (c). *Tindal* C. J., in *Legge v. Boyd* (d), appears to have doubted whether the cases relied upon in opposition to this rule had been properly decided. The general issue by statute is a compound plea, comprehending defences admissible under the general issue at common law, and also the special defences admissible by virtue of the statute only. The proviso in 4 & 5 *Will.* c. 42, s. 1, saves only the statutable branch of such a plea, and the common-law branch of it is contracted, in common with the general issue in ordinary cases, by the new rules. The common-law branch, therefore, of the plea in question having been so contracted, the whole plea is less compendious than it was, and would not put in issue, as formerly, many allegations, (as of property and other matters,) contained in the declaration. The special pleas in the present case traverse such allegations in the declaration as would neither be put in issue by the ordinary plea of not guilty, contracted as it has been by the new rules, nor would be avoided by any of the special matters of defence under the Building Act. They are therefore pleas which contain no defences already included in the statutable general issue, and should be allowed; and it may turn out that the defendants will not succeed in bringing this case within the Building Act, in which event the special pleas may be of vital importance to them.

(a) 1 M. & W. 452.

(b) 1 C., M. & R. 89.

(c) 1 C., M. & R. 258.

(d) 9 Dowl. P. C. 39; S. C. 19  
 Law Journ. N. S. (C. P.) 19.

Lord DENMAN C. J.—It is desirable that there should be a uniform rule upon this point in all the Courts.

*Cur. adv. vult.*

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The following judgment of the Court, after conference with the judges of the Common Pleas and Exchequer, was delivered at the sittings in banc after this term (May 10) by

Lord DENMAN C. J.—This was an action on the case for an injury to the reversionary interest of the plaintiff. The defendant has pleaded not guilty, and three other pleas traversing the material allegations in the introductory part of the declaration. He now seeks to add to the plea of not guilty the words “by statute” in the margin, with the view of setting up a defence under the Building Act, which has a clause enabling the defendant to do so under the general issue, and he seeks also to retain his other pleas.

The plaintiff opposes this, on the ground that not guilty “by statute” of itself puts in issue all the allegations in the declaration. An ingenious and very plausible argument was urged for the defendant, founded on a supposed double effect of the general issue, the one at common law, by which it puts in issue all the allegations of the declaration, the other by statute, which enabled the defendant to give his special defence in evidence under it, and it was contended that the proviso in 3 & 4 Will. 4, c. 42, s. 1, preserved only the latter effect, and that the new rules had destroyed the former.

The contrary was held by the Court of Exchequer in the case of *Fisher v. Thames Junction Railway Company (a)*, which was an action by a reversioner, and is directly in point. The same language was held by that Court in other cases. In conformity with that decision we think ourselves bound to hold that the plea of the general issue, wherever the provisions of any act of parliament apply to it, is wholly

(a) 5 Dowl. P. C. 773.

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unaffected by the new rules, and must have the same operation as it had before they were made.

This rule may be made absolute for the insertion of the words "by statute" in the margin of the plea upon payment of costs, and striking out all the pleas excepting that of not guilty.

Rule absolute, on the Defendant electing to strike out his special pleas.

*Warren*, in the Trinity term following, having declined to avail himself of the rule on the above terms, obtained a rule nisi for adding to the pleas, as they originally stood, three special pleas, containing his defences under the Building Act, which rule, after cause shewn by *Shee Serjt.* and *M. Chambers*, was made absolute in the same term (*a*).

(*a*) In *Bartholomew v. Carter* the Court of C. P., on the last day of Trinity term 1841, decided that they had authority to require the words "by statute" to be annexed to the statutable general issue.

*D.*

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### The QUEEN v. The BRISTOL DOCK COMPANY.

By 43 *Geo.* 3, c. clx. (an act for improving the port of Bristol), a dock company was formed, with power to convert a portion of a navigable river within the city into a floating harbour, and to make a new course for the river, and a bason to form a passage from the new course into the floating harbour, and to execute divers other works. The port is *entered* in the Bristol Channel, and nearly thirty miles from the parish in which the bason is situate.

By sect. 74 certain dues were payable to the Company for every ship *entering the port*, which dues, after defraying the expenses of repairing the bason and other works, were to be divided among the shareholders of the Company.

By sect. 64, reciting that the lands which the Company were authorised to take for the execution of the above works, would, during the time the said intended works were carrying on, and for many years afterwards, be rendered unproductive and be incapable of being rated in aid of the land and parochial taxes, the Company were made chargeable from the time of their taking possession of such lands, with all such land and parochial taxes as the same lands were then or might thereafter be subject to.

Held, that no portion of the dues payable by ships on entering the port was a profit arising from the bason, and that the bason was rateable to the relief of the poor as ordinary land, and not in respect of such dues.

the relief of the poor of the parish of Clifton, whereby the Bristol Dock Company were assessed, as occupiers, for Cumberland bason, entrances thereto, quay walls, wharfs, locks, and dock gates, at a rental of 1350*l.*, in the sum of 54*l.*, it was agreed that the Company should be taken to have rateable property in the said parish to the amount of 300*l.*, and that the rate should be reduced from 54*l.* to 15*l.*, subject to the opinion of the Court of Queen's Bench upon a case.

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The case was stated for the purpose of raising the question whether the Dock Company were rateable, as above mentioned, in respect of certain tolls payable to them by vessels *entering* the port of Bristol, and was to the following effect:

By 43 *Geo. 3*, c. cxi. s. 1, reciting that vessels lying at the quays in the port of Bristol were, by the reflux of the tide, left dry twice in every twenty-four hours, whereby favourable winds were often lost, and vessels lying in the port could not be removed out of danger in case of fire; and in case of fire among the houses in the city of Bristol, great loss might be experienced from want of water; and that these inconveniences might be remedied by cutting a new course for the river Avon, on the Somersetshire side, in the line and in the manner therein described, by erecting two dams across the old course of the Avon, with a lock in positions therein mentioned in Somerset and Bristol, and by making an *entrance bason* (the bason above mentioned as Cumberland bason) and locks in Rownham meads, in the parish of Clifton, and an entrance bason (hereinafter called Bathurst bason) and locks at Trim Mills, between the then present and intended course of the Avon, and also by executing divers other works therein described; and reciting that 250,000*l.* had been subscribed as a joint stock; a company of proprietors of the works thereby authorised was constituted, to be called "The Bristol Dock Company."

By sect. 20, the sum of 250,000*l.*, so subscribed, was

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declared to be insufficient, and the Company were enabled to borrow 50,000*l*.

By sect. 30, the Company were required to cut the new course for the river, and to make the dams and basons above mentioned, so as to dam up a certain portion of the old course of the river running through the city of Bristol, and convert it into a floating harbour, from which the spring tides should be excluded, and made to flow through the new course of the river, and by means of the said two basons to afford a passage for shipping from the said new course to the floating harbour.

They were also, by various other sections, required to make various other works, such as cuts, drains, locks, bridges, and a towing path, in other parts of the port and in other parishes.

By sect. 39, they were required to deepen the beds of the rivers Avon and Froome in such parts thereof as might be necessary for the accommodation of the trade of the port of Bristol.

By sect. 64, after reciting that by the making and using the entrance bason, new course of the river, and other works, certain *lands in Clifton, Bedminster, Brislington, Keynsham, St. Philip, and St. George*, which at that time were rated to and paid the land and parochial taxes in the same parishes, would, during the time the said intended works and alterations were carrying on, and for many years after, be rendered unproductive and incapable of being rated in aid of the said land and parochial taxes, by which means a greater burthen must be laid on other lands in the same parishes, it was enacted that the appellants should become chargeable from the time of their entering into and taking possession of such lands, tenements, hereditaments, and premises, *with all such land and parochial taxes as the same lands and premises then were* or might thereafter be subject to, and that the fund of the Company should become liable to pay such land and parochial taxes then charged, or thereafter to be charged, on the same land and

premises during the execution of the works, and for ever thereafter.

By sect. 74 it was enacted, that *from the expiration of twelve calendar months* after the works thereby authorised should have been begun, there should be payable and paid to the Company, for every ship or vessel *entering into the port* of Bristol, except barges or other vessels passing to or from the Bath river navigation, and not discharging any part of their cargoes at the quays at Bristol, the several rates and duties thereafter particularly rated and described, to be applied by them for the purposes of the act; and (by sect. 75) for all goods, merchandizes, &c. whatsoever, imported from parts beyond seas, but not brought coastwise or by inland navigation into the port of Bristol (except certain articles of provisions), the several rates and duties particularly specified in the schedule to the said act.

By sect. 25, the surplus fund, after discharging the interest of money borrowed, and the expenses of repairing and preserving the cuts, drains, locks, bridges, towing paths, and other works, was to be divided annually among the subscribers, not exceeding 8 per cent. per annum.

By a return made in Trinity term, in the 10th *Geo.* 1, to a commission issued out of the Exchequer on the 15th February preceding, in pursuance of the 14 *Car.* 2, c. 11, it appeared that the limits of the port were assigned to be from the westwardmost parts of the Flat and Steep Holmes (two islands), up the course of the channel eastward, to Aust, in the county of Gloucester, and from the said Holmes southward across the channel to a place called Uphill, which was included, and from thence along the coast or shore eastward, in the counties of Somerset and Gloucester, to Aust aforesaid, and also from a place called the Holes Mouth, in Kingroad, up the river Avon, to the said city of Bristol, together with the several Pills lying upon the said river.

Under the powers vested in them, the Company, in 1804, purchased and took possession of land in the parish of

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Clifton, called Rownham Mead, which at the time of their so taking it was pasture land, of the yearly value of 44*l.* 18*s.* 6*d.*, and paid land tax, and were assessed to and paid parochial taxes for it as being of that value, and, if the same land had still continued to be and now were in the like state of pasture land, it would be of the value of 67*l.* 7*s.* 9*d.* The Company contended that they were liable to be rated for this land according to the latter value. The greater part of this land was covered by the entrance bason, called Cumberland bason, and walls thereof, &c.

The Company executed the works prescribed by the act, the effect of which was that all the parts of the river adjacent to the wharfs and quays at Bristol, which were formerly left dry at the ebb of the tide, were now kept full of water at all times of the tide, so that vessels are kept afloat therein and can be moved about at pleasure, and the parts so floated are called the Floating Harbour.

Cumberland bason, and another bason called Bathurst bason, situate in another parish, are so constructed as to afford to vessels an entrance and passage from the new course of the river (wherein the tide ebbs and flows) into the floating harbour, which, except when occasionally emptied for cleansing, is kept permanently full; and these two basons are necessary and were constructed for that purpose, and in order that a vessel may get to these quays at Bristol, it is necessary that she should pass through one or the other of these basons. A very principal part of the vessels coming to discharge goods at the quays of Bristol, including most of the West Indiamen and other large vessels, and the greater part of the timber trade, were now admitted into the floating harbour through Cumberland bason, and that bason was necessary for the superior foreign trade, but a considerable portion of the trade, including occasionally large vessels at spring tides, and nearly all the coasting vessels at all times, and a portion

of the timber trade, were admitted into the floating harbour through Bathurst bason.

For the accommodation of the trade and of the steam-packets frequenting the port, the Company permitted the walls of Cumberland bason to be used as quays, for which they received in the course of the year 311*l.*, but no toll or duty for such landing is given by the act. [As to this sum of 311*l.*, no question arose on argument, the case stating that the costs of repairing the bason, communibus annis, would exceed this sum. The question therefore stated by the sessions as to this part of the case has been omitted.]

The extent of the port of Bristol is in length, from a point between the two islands, called the Holmes, to Aust, 27 miles; from the place called Holes Mouth, or the Mouth of the Avon, up to Cumberland bason, is 6 miles, and from thence to Tower Harratz, the eastern extremity of the port, is 2½ miles. The distance from the Steep Holmes across the port eastward to Uphill, is 4½ miles; and the area of the port within these limits is 43,555 acres, of which the land taken by the Company in Clifton, supposing it to be 12 acres, would be the 3629th part only. The port of Bristol, including the space between high water and low water mark, extends into the parishes of Uphill, Weston super Mare, Week St. Lawrence, Kingston Seymour, Clevedon, Walton, Portishead, Easton in Gordano otherwise St. George's, Abbots Leigh, and Long Ashton, in the county of Somerset, and Henbury, and Westbury upon Trym, in the county of Gloucester, and the parishes of St. Augustine, St. Stephen, St. Thomas, Temple otherwise Holy Cross, St. Mary-le-port, St. Leonard, St. Nicholas, St. Philip and Jacob, Redcliff, and Clifton, in the city of Bristol, and into such parts of the parishes of Bedminster and Brislington as lie in that city.

The dock dues are demanded and collected from vessels discharging goods at Uphill, Weston super Mare, Portishead, Aust, and all intermediate places on the coasts of Somerset and Gloucestershire, along the sides of the rivers

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Severn and Avon, within the limits of the port, from small vessels which habitually discharge their passengers at Rownham below the locks and Cumberland bason, and which do not enter the bason, and from the "Great Western" steam vessel trading to New York, which never enters Cumberland bason, nor approaches nearer to it than Kingroad, upwards of six miles distant, and from other vessels entering and trading within the port and lying in Kingroad, which is a principal place of anchorage in the Severn for vessels entering into and sailing from the port of Bristol, and from vessels anchoring and trading in other parts of the port. The collector demanded and received the duties from them upon the vessels entering and trading within the port as constituting their liability thereto, without reference to any particular part of the port, and without inquiring whether the vessel was discharged, and that alike whether they went up to the quays of Bristol through Bathurst bason, or through Cumberland bason, or whether they discharged in that bason, or whether they never entered either of the basons at all. The duties collected from vessels not entering one or the other of the said basons for the purpose of discharging their cargoes, but discharging their cargoes in any of the remoter parts of the port, were trifling compared with the aggregate amount of the duties. No part of the rates and duties imposed by the act, nor any money, except the above-mentioned 311*l*. is collected by the Company within the parish of Clifton. The principal part is received at the Bristol custom-house in the parish of St. Nicholas in the city of Bristol, and the residue (collected at the distant parishes in Somerset and Gloucester) has been received by the agents there for the principal collector.

The whole of the works executed by the Company, and upon which their funds have been expended (except only the towing path along the banks of the river Avon) lie within the present boundaries of the city of Bristol.

If the Court of Queen's Bench should be of opinion

that the Company were rateable in the parish of Clifton, in respect of the land in that parish so taken as above mentioned, or any of it, and by reason of their receipt of the whole or any proportion of the rates and duties imposed by the said act on vessels entering into the port of Bristol, and of the rates and duties thereby imposed on goods, wares and merchandises imported from parts beyond the seas, but not brought coastwise, or by inland navigation, into the port of Bristol, or either of them, then by agreement the property of the Company in Clifton for the purpose of the present rate is to be taken as being of the rateable value of 300*l.* &c. as above mentioned, and the appeal to be dismissed.

If the Court should be of opinion that the Company were not liable to be rated in respect of the said land, either for or in proportion to the said rates and duties, or any portion thereof, but that they were liable to be rated in respect to the said land so by them taken in Clifton, after the rate which the same would now be worth to let at in case the same were now in its original state of meadow or pasture land, and with reference to the land so let in the immediate vicinity, then the appeal is to be allowed, and the assessment on the appellants is to be reduced to 3*l.* 7*s.* 6*d.* being 1*s.* in the pound on 67*l.* 7*s.* 6*d.* the present rateable annual value of such land in such state &c.

Sir *F. Pollock*, *Erle*, and *Hodges* in support of the order of sessions. The Dock Company are rateable to the parish of Clifton for Cumberland bason, not according to its value as ordinary land, but in respect of the tonnage dues as a profit arising from the bason. It may be said that these dues cannot in any respect be considered as a profit arising from this bason, because they become payable to the Company by ships on *entering* the port at a distance from the parish where the bason is situate. But it is obvious that the bason and the other works to be executed

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were the consideration for which the dues were granted, and, if the Company were to destroy these works, or to exclude the public from them, they would be no longer entitled to the dues. The works, therefore, of which the bason forms part, being the sole meritorious cause of the dues, some portion of the dues must be a profit of the bason, and this appeal is to be dismissed if the Company are liable under this rate for any portion of them. The great object of the act passed for improving the port, appears to have been the construction of the floating harbour as a means of securing an adequate depth of water for the shipping at all times of the tide, and the floating harbour would be useless unless there were a passage to it from the new cut, along which vessels are now navigated up to the city of Bristol. This passage is furnished by Cumberland bason and Bathurst bason, but Cumberland is the more convenient entrance for all vessels, and is the only entrance for large vessels. It matters not where the dues are taken; the question is, where is the subject-matter which earns them: *Rex v. Barnes* (a), in which case the Hammersmith Bridge Company were held rateable in the parish of Barnes for some part of the tolls taken in the parish of Hammersmith. "The Hammersmith Bridge Company," said *Bayley J.*, "have, in the parish of Barnes, land used by them for the purpose of facilitating the passage over the Thames, and they are entitled to receive from all persons passing their bridge certain tolls. Then what is the character of their occupation of that land? It is a valuable occupation, in respect of the money which the land produces to the Company, by being appropriated to the purpose of facilitating the passage over the Thames, for which passage they receive tolls. The quantum is a question for the sessions. All that we decide is, that the land is rateable property in the place where it is situate. There the profit is earned, though the money may be actually received elsewhere." So the bason in this case is a valuable occupation in respect of its being

(a) 1 B. & Ad. 113.

appropriated to the purpose of facilitating the passage to the quays at Bristol, for which passage the Company receive dues. The dues were granted to this Company not in respect of that extended district, which it appears from the report, made in the time of *Car. 2*, is comprehended within the natural port of Bristol. The ownership of the natural port is still vested in the mayor and corporation, and the Company have nothing to do with it. The Company have not executed any works in the Severn, or in any remote part of the port. It is unreasonable, therefore, to suppose that the grant of tonnage dues can have any reference to the *natural* port, for which the public is in no wise indebted to the Company. It is for their works that these dues are paid to the Company; and it is on entering the *artificial* port, of which the Company are occupiers, that such dues are payable. The *Kingston-upon-Hull Dock Company v. Browne* (a) affords an instance of a similar statute restricting the signification of the term "port" in the way now contended for. The Hull Dock Company had previously been held rateable (b) for their tonnage dues as a profit of their dock, and in that case it was held that the liability to pay these dues did not attach upon vessels which came only to the remoter parts of the natural port, as to Goole on the river Ouse, without entering the artificial port. Lord *Tenterden* C. J. there observed in delivering the judgment of the Court, "there being then two distinct senses in which the phrase, the port of Hull, is used—namely, one as the head port of a district wherein there were subordinate and dependent ports; and the other, the limited (and this also the popular) sense, of a port situate locally on a certain river or part of a river, with a town near thereto, we are to inquire and determine in which of these two senses the phrase or name is used with regard to the rates in question in this cause." "The rate in question is im-

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(a) 2 B. & Ad. 43—58.

(b) *Rex v. Hull Dock Company*,  
 1 T. R. 219, and 5 Mau. & S. 394.

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posed as a remuneration for the expense of excavating and making a new dock or bason for the reception of ships at Kingston-upon-Hull. All vessels that resort to that place derive benefit from this measure." "Vessels that do not enter the haven, but land or take their goods at other places, derive no benefit." His lordship then goes on to say, in reference to the statute there in question, "We shall certainly find nothing to give a more extended sense to the name or phrase 'the port of Kingston-upon-Hull,' than its local and popular sense, and much wherein it is evidently limited to that sense." By section 65 of the Bristol Dock act, this bason and the other works to be executed by the Company are made part of the city and port of Bristol. Section 64 does not exempt the Company from rateability in respect of the tolls, nor is it reasonable that the section should have such an effect. The Company have taken the land on a speculation, entitling them to divide eight per cent. among their members, and the section expressly imposes upon the Company such rates as the land was then, or might be thereafter, subject to.

Sir *W. W. Follett* and *Davison* contra. It having been established by *Rex v. Nicholson* (a), and other cases, that tolls are not rateable per se, but merely as the profit of the land for the use of which they are paid, the only question in this case is, whether the tonnage dues granted to the Bristol Dock Company are a profit arising from Cumberland bason, and in the parish of Clifton. "Property, whether real or personal, or rather the product upon which the rate is laid, must arise in the district for which the assessment is made (b)." In cases where canal owners have been held rateable for tolls as a profit of their land, such profit has arisen from the actual use of the land. The toll has accrued, as a profit, on each occasion of the use, and on no other occasion, and the amount of the profit has been in proportion to the extent of land used: *Rex v.*

(a) 12 East, 330.

(b) 1 Nol. P. L. 207.

*Woking (a)*. The profit in this case has no necessary connection with the land rated. The tonnage dues are payable by every vessel, whether it uses Cumberland bason or not. A certain sum is payable on entering the port several miles from the bason, and no greater sum is payable if the vessel goes through Cumberland bason on to the quays at Bristol. The 'Great Western' steam vessel never enters the bason or comes nearer to it than Kingroad in the river Severn. The tonnage dues are incurred on passing a particular point, as it were, and resemble tolls for passing a lock. Here it is contended that the port is profitable because of the bason, and therefore that the profit arises in some degree from the bason; just as in *Rex v. Inhabitants of Lower Milton (b)* it was contended that the lock was profitable because it was supplied with water from the rest of the canal lying in other parishes, and therefore that the toll payable for passing through the lock was a profit, in part, earned, and therefore rateable, in the several parishes through which the canal passed. But *Bayley J.*, in delivering the judgment of the Court, repudiated the argument, saying, "it might as well be contended that the profits of a bridge which would not arise unless there were roads to it, or of land rendered more valuable by roads in an adjoining parish, should be rated in part only in the parish in which such bridge or land is situate." So in *Rex v. Coke (c)*, where it was held that a light-house was not rateable in the parish where it was situate, in respect of tolls payable by ships passing by, *Littledale J.*, with reference to the rateability of tolls, observed, "in some cases where they arise from, and are so far connected with a house or land, that the land or house which gives occasion to the toll is made more valuable in itself, that increased value, depending upon, and being regulated by, the profits produced by the toll, is the subject of rate. In all those cases

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(a) 4 A. & E. 40; S. C. 5 N. & R. 711.

& M. 395.

(c) 5 B. & C. 797; S. C. 8 D.

(b) 9 B. & C. 810; S. C. 4 M. & R. 666.

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the profit has arisen, and the use of the thing out of which they have arisen, has been in the place or district where the rate is made. Here the profits do not arise, nor does the use of the light take place in the parish of Lydd." *Rex v. The Undertakers of the Aire and Calder Navigation* (a) (Case of the Hunslet Mills) distinctly points out that a profit granted *collaterally* in consideration of the subject-matter rated cannot be included in the rate, and that the profit is not liable unless it arise *directly* from the use of such subject-matter. There the owners of mills in the township of Hunslet, in compensation for the loss of water occasioned to them within the township by an adjoining navigation, were allowed by act of parliament to take certain tolls at a lock situate in the line of navigation, but in a different township, and it was held that they were not rateable in Hunslet, because the tolls did not constitute a profit arising from the land rated in that township. The very terms in which the present dues are granted shew that they are collateral to the bason and other works of the Company, for by sect. 74 the dues become payable twelve months after commencing the works, provided (by sect. 75) 100,000*l.* shall have been expended thereon, although this sum is only a third of the amount to be so expended, and although, as appears from other sections, it was contemplated that the works would not be finished for several years.

The Hull dock cases are no authority to support the present rate. By sect. 42 of the Hull Dock Act the tonnage dues were expressly granted "in consideration of the great charges and expenses of the making, building, erecting, and providing such bason or dock, quay or wharf," and other works; and the dues were accordingly made payable "for every ship or vessel coming into or going out of the said *harbour, bason, or dock*, within the port of Kingston-upon-Hull, or unlading or putting on shore, or

(a) 3 B. & Ad. 533.

lading or taking on board any of their cargo, or any goods, wares, or merchandize, within the said port;" and the Court further held that the word "port" was specially applied, "in its local and popular sense," as identical with the "harbour" referred to, and as excluding those parts of the natural port which were unconnected with the artificial harbour. In the Bristol Dock Act there is nothing to indicate any such special application of the word "port." *Rex v. Inhabitants of Barnes (a)* may be sufficiently distinguished by referring to the judgment of *Littledale J.* "the tolls are payable for passing over the bridge, not for passing through the toll gates. The gates are put up merely to prevent persons passing over the bridge without paying the toll."

If this rate is good in principle it would be impossible to ascertain for what proportion of the dues Cumberland bason should be rated. The port extends through many parishes in which the Company have no land, on some of which they have expended their capital and executed works, as by deepening the old beds of the Avon and Froome, of which they were not the occupiers: and the dues, if payable in respect of their works, must be deemed equally payable for the works executed on land of which the Company have no occupation.

The 64th section, of itself, shews that the land taken in Clifton is to be rated as ordinary land in the vicinity, and without reference to its improved value as a bason concerned in earning tonnage dues. That section recites, that the land so taken will be unproductive for many years *after* the completion of the works, which could not be the case if the bason were to be considered as productive in respect of the tonnage dues, for they are made payable *before* the completion of the works. The reasonable meaning of the section is to construe it as a bargain made by the legislature between the Company and the parish: in order that

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"no greater burthen" of rateability should fall on other lands in the parish, by reason of the land taken eventually turning out unproductive, and so not rateable, the Company are at the outset to pay the ordinary rate, and, as a set off, if at any future time the land should become productive, they are not to pay an increased rate. The rate payable at the time of their taking the land is to be paid "for ever thereafter." This section, therefore, is to operate for all time, and it can only so operate by subjecting the land for ever afterwards to the same ordinary rate which is made payable originally, for, if as soon as the land became productive it would be rateable under the 43 *Eliz.* c. 2, on its improved value, the section in question would cease to operate.

*Cur. adv. vult.*

Lord DENMAN C. J., at the sittings after this term (May 10), delivered the judgment of the Court:—This case comes before us upon an appeal, by the Bristol Dock Company, against a rate made for the relief of the poor of the parish of Clifton, wherein the said Company was assessed in a certain sum for "Cumberland bason, entrance to bason, quay-walls, wharfs, locks and dock gates." Upon the hearing of this appeal, a case was stated for the opinion of this Court; from which it appears that the said Company was formed under an act of parliament, for the improvement of the port and harbour of Bristol. By virtue of this act the Company was invested with various powers for the effecting of such purposes. Accordingly the Company purchased about 11 acres of land, in the respondent parish of Clifton, and made the works upon which the assessment has been made. It is further stated, that the port of Bristol extends over more than thirty parishes, including the respondent parish of Clifton, and that the tolls and dues, in respect of which it is sought to assess the appellants, are imposed upon *every vessel entering the port* of Bristol, and are collected in different parts of the port of

Bristol, out of the said parish of Clifton. It is stated, however, that no part of the said tolls or dues, except the sum of 311*l*. (as to which no question arises), is received by the appellants within the parish of Clifton, and further, that in many (if not most) of the said parishes, composing the port of Bristol, the Company has no property whatever.

Upon this state of facts, we have to consider whether the Company ought to be rated in respect of the property above described, in the same proportion "as other land in the immediate vicinity, in its original state as meadow or pasture land," or with the addition of all or some proportion of the said tolls and dues so collected within the port of Bristol.

This question divides itself into two parts: first, whether by virtue of the said act the Company is made rateable in the latter manner; and, if not, whether it be so by virtue of the law generally applicable to the rating of property of this description.

The first question turns upon the 64th section of the act, which especially refers to the manner in which the Company is to pay land and other taxes, the other sections to which we were referred in the argument, respecting principally, if not entirely, the manner in which the act was to be carried into effect. (His lordship then read the section.) We think that this enactment falls much short of charging the Company with liability in respect of the tolls and dues in question. For, first, if it had been meant to charge the Company with such additional liability, it is hardly probable that the property would have been described as "rendered unproductive and incapable of being rated" during the work and for many years afterwards. Because the nature of the works (as described in the act) being to make a more commodious communication with the port of Bristol, and generally to improve the same, if the tolls and dues therein received had become liable to the rate, some profit at least must have been expected, *immediately* upon the completion of the works and the use of the bason entrance; and indeed

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the act gives the tolls to commence at the end of twelve months from the commencement of the works. Moreover, the mode of rating upon the then state of the property is expressly declared to be the mode to be adopted "for ever thereafter."

The question then is, whether this property be liable to be rated at the increased value, independently of the operation of this said act. Upon this point, since the decision of the cases of *Rex v. Nicholson* (a) and *Williams v. Jones* (b), the principle upon which the rate upon tolls is to be imposed has been fully established, though the application of that admitted principle to each particular case may not always be easy; it is this, that the tolls are rateable as profits of land, occupied within the parish, for which the rate is imposed, and agreeably to it water companies have been rated, (*Rex v. Corporation of Bath* (c)). So also gas light companies (*Rex v. Birmingham Gas Light Company* (d)), and canal companies (*Rex v. Woking* (e)). In all these cases, and in many others, to which, in a matter not now to be disputed, it is not needful to refer, the rate is imposed in respect of profits arising within the parish. Whether this principle, so established in these cases, would, without further authority, necessarily exclude the consideration of profits arising elsewhere, it is not necessary to consider. Because we find the principle, so extended, expressly recognised, and the reasons for it most fully given, especially by Bayley J. and Littledale J., in the case of *Rex v. Coke* (f), where the tolls of a light-house were held not rateable, because they accrued out of the parish. It was further added, by both those learned judges, that in the cases to which we have above generally referred, "the profits have arisen, and the use of the thing out of which they have arisen, has been in the place where the rate is made."

(a) 12 East, 330.

(b) 12 East, 346.

(c) 14 East, 621.

(d) 1 B. & C. 506; S. C. 2 D.  
 & R. 735.

(e) 5 N. & M. 395; S. C. 4 A.  
 & E. 40.

(f) 5 B. & C. 797; S. C. 8 D.  
 & R. 666.

This question again came before this Court in the case of *Rex v. Aire and Calder Navigation* (a), and the same principle was again recognized by the Court, in a short judgment, probably because the subject was considered as exhausted by the reasoning of the two learned judges above referred to, which was expressly brought under notice and relied upon in the course of argument.

Upon the whole, we are of opinion that the assessment should be reduced to the sum of 3*l.* 7*s.* 6*d.*, being after the rate of 1*s.* in the pound on 67*l.* 7*s.* 6*d.*, "the present rateable annual value of the property in question, *as land.*"

Order of Sessions quashed.

(a) 3 B. & Ad. 533.

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April 26th.

CASE against the sheriff of Oxfordshire for a false return to a writ of fieri facias. The declaration stated that the plaintiff, after obtaining final judgment against *Richard Walter Lord Viscount Chetwynd* for 318*l.* 3*s.*, damages, &c., sued out a writ of fi. fa., directed to the sheriff of Oxfordshire, commanding him to levy of the goods of the said Viscount *Chetwynd* the damages aforesaid, &c.; that the writ was duly indorsed to levy the sum of 185*l.* 6*s.* 5*d.*, and delivered to the defendant, as sheriff of the said county, to be executed; by virtue of which writ the defendant took in execution the goods of the said Viscount *Chetwynd* of the value of the monies so indorsed and directed to be levied, and then levied the same thereout. Breach, that the defendant had not paid the said sum of 185*l.* 6*s.* 5*d.* so levied, or any part thereof, to the plaintiff; and that the defendant had falsely returned to the said writ that the said Viscount *Chetwynd* had not any goods and chattels in his

Nulla bona is a proper return to a writ of fi. fa., where the sheriff has paid the proceeds of an execution either in discharge of rent under 8 Ann. c. 14, or of a prior writ; and evidence of such payments will support a plea of nulla bona to an action for a false return.

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bailiwick, whereof he could cause to be levied the damages of 185*l.* 6*s.* 5*d.* or any part thereof.

Pleas: 1, Not guilty: 2, That the defendant did not seize and take in execution the said goods by virtue of the said writ of *fi. fa.*, in manner and form, &c.: 3, That the said *Richard* Viscount *Chetwynd* had not any goods or chattels in the defendant's bailiwick, whereof, &c. Issue joined.

At the trial before *Alderson* B. at the Gloucestershire summer assizes, 1839, it appeared that the goods in question had been actually seized under the plaintiff's writ, but that a writ of *fi. fa.* for 77*l.* 9*s.* against the goods of Lord *Chetwynd*, at the suit of another judgment creditor, had been first delivered to the sheriff, and that there was also at the time of the levy alleged in the declaration 153*l.* due by Lord *Chetwynd* for rent. The goods were sold for 205*l.* 9*s.* 6*d.*, which the sheriff, after payment of the above rent, applied in part payment of the prior writ.

It was objected for the plaintiff that neither the payment of the rent nor the payment under the prior writ was admissible in evidence under the above pleas. The learned judge admitted the former payment in reduction of damages, and the latter in bar of the action. The plaintiff had a verdict for nominal damages, with leave to move to increase them if neither of the payments was admissible in reduction of damages; and the defendant had leave to move to enter the verdict for himself if both payments were admissible in bar of the action. •

In the following Michaelmas term rules nisi, pursuant to the leave reserved, were respectively obtained by the plaintiff and defendant, and now came on for argument together.

*Ludlow* Serjt. and *Francillon*, for the plaintiff. First, the plaintiff is entitled to retain the verdict. The payment of rent is matter collateral to the merits of this action on the pleadings. It is matter in confession and avoidance, which required a special plea; and it was not admissible in

bar of the action as a discharge, under pleas which traverse the seizure. The sheriff ought to have made a special return to the plaintiff's writ, stating the facts. A precedent of such a return is found in *Impey's Office of Sheriff*, p. 397. [*Patteson J.* Is there any precedent there of a special return when the rent or a prior writ has exhausted the whole levy?] No; but a special return of that nature was shewn in *Keightley v. Birch (a)*. On a special return or plea the plaintiff might be able to dispute the amount of rent due or the validity of the claim to it.

By the 8 *Ann. c. 14*, which the other side will rely upon, the *execution creditor* must pay the rent before sale: the sheriff must seize therefore in order to repay him. Payment of the rent admits a seizure, and disproves the defendant's pleas.

Secondly. The same argument applies to exclude evidence of payment under the prior writ; and *Drew v. Lainson (b)*, properly considered, shews that the defendant might have confessed the service under the plaintiff's writ, and avoided it by averring payment under the prior writ (c).

*Keating* contra. The cases of *Hutchinson v. Johnston (d)*, *Jones v. Atherton (e)*, and the judgment of *Patteson J.* in *Giles v. Grover (f)*, clearly establish that the seizure enures to the use of the writs in the sheriff's office, according to their priority, without reference to the writ or warrant under which the goods are actually taken, the property in them being altered not by the seizure but by the sale. Then the priority of the first writ is admissible under a traverse of the seizure. In *Wright v. Lainson (g)*, where,

(a) 3 Campb. 521.

(b) 3 P. & D. 245.

(c) Another point made at the trial, and afterwards touched upon in the argument, that the particular officer to whom execution of the prior writ was intrusted, had been

guilty of laches, whereby that writ had lost its priority, was ultimately given up.

(d) 1 T. R. 729.

(e) 7 Taunt. 56.

(f) 9 Bing. 128.

(g) 2 M. & W. 739.

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to a declaration precisely similar to the present, not guilty was the only plea, it was held that the property of the assignees of the judgment debtor under a fiat, issued after the seizure, upon an act of bankruptcy committed before the seizure, could not be given in evidence under that plea; but a new trial being granted on payment of costs, and an application made to the court for leave to traverse the seizure, and also to plead the defence specially, the application was refused, upon the ground that such defence could be given in evidence under the traverse (a). So in this case, the goods being bound by prior claims, there was virtually no seizure under plaintiff's writ. If this be so, the rule to increase the damages must be discharged. In *Wintle v. Chetwynd* (b), upon a rule to set aside the return respecting these very goods, *Patteson J.* held that the sheriff could not return a seizure under two writs, nor, in fact, seize under two writs.

Secondly. The payment of rent is admissible under these pleadings; for the return of nulla bona is a good return. Where the proceeds of the goods have been absorbed by a prior writ, such a return is clearly good, for in the number of cases in which actions are brought against the sheriff for a false return, where the priority of the writs came in question, it never was suggested that, even if another writ had priority, the facts should have been specially returned, although in each case such a point would have been material: *Uppom v. Sumner* (c), *Bradley v. Wyndham* (d), *Rybot v. Peckham* (e), *Towne v. Crowder* (f). If then nulla bona be a good return, where a prior writ has absorbed the proceeds of the goods, à fortiori it must be good where such proceeds have been absorbed by a prior writ and a claim to which such prior writ itself is subsequent. Had there been two prior writs, the return would have been good: the claim for

(a) *Wright v. Lainson*, 3 M. & W. 44.  
 (b) 7 Dowl. P. C. 554.  
 (c) 2 W. Bla. 1251, 1294.

(d) 1 Wils. 44.  
 (e) 1 T. R. 731, n.  
 (f) 2 C. & P. 355.

rent is prior to any number of prior writs: *Lane v. Crockett* (a), *Colyer v. Speer* (b). There is no form of special return where the rent has absorbed *all* the proceeds of the goods. Such return seems only necessary where a knowledge of the special facts will enable plaintiff to take some other steps, as, when judgment debtor is a beneficed clerk, the return enables plaintiff to sue out a sequestrari facias. If the return be good, the payment of rent and priority of the first writ must clearly be admissible under the present pleadings, because every material allegation in the declaration, except the delivery of the writ to the sheriff, is put in issue by them. It would be impossible to frame a plea in confession and avoidance which should not either be demurrable, or, by confessing the falsehood of the return, render avoidance impracticable upon the present facts.

It is to be considered also that the sheriff is a public officer in the discharge of a public duty, and should not be harassed with actions where no damage is sustained or any right infringed: *Williams v. Mostyn* (c). [Lord Denman C.J. We acted lately upon that case in this Court (d).] The case never has been doubted: the right of the plaintiff in the present case is to have the proceeds of the goods, if available for his execution, at Westminster. It cannot be said there were any goods available for that purpose. How has he been damnified? No special return of the facts could have in any way improved his condition.

LORD DENMAN C. J.—I am of opinion that the rule to increase the damages must be discharged, and that the rule to enter a verdict for the defendant ought to be made absolute. It was not a false return that the debtor had not any goods in the defendant's bailiwick, out of which he

(a) 7 Price, 566.

(b) 2 B. & B. 67.

(c) 4 M. & W. 554.

(d) See *Randell v. Wheble*, 2 P. & D. 602.



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could levy the damages. It is clear that under the stat. 8 Ann. c. 14, and the expedient construction it has received, the sheriff finding, on seizure of the goods, that there was an arrear of rent, which would absorb the proceeds of a sale, would have, in truth, no goods of the debtor wherewith to satisfy the writ. The defendant has done nothing wrong in making a return to that effect in the present case. I had, indeed, some doubt how far the plaintiff might be prejudiced by that mode of return, but I do not see how he could be; and, as no valid distinction in principle can be made between the case of a prior writ and that of rent exhausting the levy, I think the return made in this case was a correct return, and that it affords an answer to the action. It is unnecessary to consider whether this defence is admissible under the general issue, or must be specially pleaded, because in this case there is a plea of nulla bona; but we should, very possibly, acquiesce in the decision of the Court of Exchequer.

PATTESON J.—It is clear that the rule to increase the damages cannot be sustained, because the first writ had priority; and, although the goods were seized under the plaintiff's writ, yet, as they were not sold also under it, the plaintiff could not claim the proceeds. With regard to the defendant's rule to enter the verdict, I do not see how he could plead the facts specially without admitting a false return, which would put him out of court at once, as he could not shew any sufficient avoidance. The question then is, was nulla bona a good return on the facts of this case? I think it was. The sheriff, in making a return, is not bound by the rules of pleading. But if he *had* made a special return, stating the seizure and sale, the payment of rent, and the prior writ, and that the debtor had no goods applicable to the plaintiff's execution; would not that in effect be a return of nulla bona? It is singular that an action should be brought against a sheriff for a false return

of nulla bona, where rent has absorbed the levy, because the stat. 8 Ann. c. 14, enacts in substance that, on seizure and notice of rent being due, the person suing out the writ shall pay the landlord all the rent due to him, and the sheriff is then to levy both the rent and the execution money. This course was probably found to occasion much trouble; and the sheriff soon began to levy the rent out of the goods and himself to pay the landlord; and that practice has since prevailed. If the sheriff on seizure finds that the rent in arrear exceeds the value of the goods, he must either make them over to the landlord, or sell them and pay him the money. The case of *Wintle v. Lord Chetwynd* (a) is not correct, at least if I am rightly reported to have held that a sheriff cannot seize under two writs. I may have used the expressions attributed to me, but I intended to decide that it was not enough for the sheriff to return generally that he had seized by virtue of two writs; he ought to state what amount he puts to the first writ, in order that the plaintiff may know how to proceed.

WILLIAMS J.—I am satisfied that nulla bona was a return applicable to the facts of this case. A special return, stating the facts, would have been an argumentative return of nulla bona.

WIGHTMAN J. concurred.

Rule to increase damages discharged:

Rule absolute to enter verdict for defendant.

(a) 7 Dowl. P. C. 554.

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By a faculty granted in 1738, by the ecclesiastical court of Ely, the Masters of Arts' Pit, and the north and south galleries, in the parish church of St. Mary, Cambridge, were appropriated to the University. In 1819, by agreement with the then churchwardens, the University, at their sole costs, enlarged the Masters of Arts' Pit and the galleries, and erected ten new pews, and for that purpose removed the organ into the tower, and made other alterations; and the University afterwards instituted, by letters of request, a suit in the Court of

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the churchwardens and parishioners, to confirm the erections and alterations, *and to appropriate the same to the University and their successors exclusively.* The official principal received the letters of request and the act on petition, answer and reply. To a declaration in prohibition by the churchwardens, &c. disclosing these facts, the University demurred, and this Court gave judgment for the defendants in prohibition, on the ground that, supposing the grant of a faculty for a pew to a corporation to be illegal, and that prohibition would lie for a faculty before it is granted (which was doubtful), yet a faculty to confirm erections and alterations would be legal, and the spiritual court had done nothing illegal as yet, and it was not to be presumed that court would not limit the faculty to those objects which might be legally embraced in it.

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**PROHIBITION.** The declaration stated that the church of St. Mary, in the town of Cambridge, is a parish church, erected by the inhabitants and parishioners, on the site of a more ancient parish church, and repaired (except as to divers occasional voluntary contributions and reparations made by the defendants and others) by rates from time to time assessed on the inhabitants and parishioners. That the organ, clock, bells, pews and galleries, are the property of the parishioners, and not of the University of Cambridge. That before and at the time of demanding of the letters of request by the University, as hereinafter mentioned, the said church, exclusive of the seats in the nave, and in the north and south aisles, and in the galleries, was and is insufficient for the accommodation of the parishioners and inhabitants during divine service. That the chancellor, masters and scholars of the said University, at the time of such demand, were and still are a corporation, called The Chancellor, Masters and Scholars of the University of Cambridge, and were and are not occupiers of any messuage or house in the said parish, or rated to the repairs of the said parish church in respect of any messuage or house in the parish. That the said University have not from time immemorial possessed or enjoyed any pews or seats either in the nave of the said church, or in either of the aisles or galleries, nor have they any right to possess or enjoy any pews or seats by prescription or otherwise.

Yet the said chancellor, master and scholars, well knowing the premises, but intending to injure the plaintiffs and other parishioners, did, on the 28th April, 1837,—with the intention of commencing and prosecuting a cause in the Arches Court of Canterbury, against the patrons, perpetual curate or incumbent, churchwardens, parishioners and inhabitants of the said parish of St. Mary, “in order to obtain a faculty to the said chancellor, masters and scholars, and their successors, for confirming certain additions and alterations theretofore made in the said church of St. Mary, to wit, an enlargement or addition to a certain area or space called or known by the name of the Master of Arts’ Pit, situate in the middle aisle or nave of the church, by the extension of the same from the west end thereof, for the distance of 13 feet, towards the west end of the said church, the said addition being of the same width as the said pit, and the erection and building of four pews or seats on the south side of the said addition to the said pit, and four other pews or seats on the north side of the said addition to the said pit, the taking down or removal of the staircases or entrances into the galleries on the north and south aisles of the said church, and the organ loft, and the removal of the organ into such part of the tower as was not occupied by the clock and its appendages, and the erection and making of a balcony or gallery for the accommodation of the choristers, and also the extension and prolongation of the galleries in the aisles of the said church, and the making of the continuation of the galleries so prolonged across the west end of the nave of the said church, in lieu of the organ loft so removed, and the erection of new staircases unto the said galleries, at the western ends of the said side aisle, from the archways in the south of the said church, and of a new staircase leading as well to the new organ loft as to the belfrey, at or near the western extremity of the south aisle of the said church; and also for the removal of the consistory courts, and the seats and presses therein, with the documents and records remaining in the said court, and

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the placing the same in the opposite or north aisle of the said church; and also the erection and building of three arches of stone for the support of the said new gallery across the nave at the west end of the said church, the centre of which said arches to be left open, in order to afford access to the said Master of Arts' Pit; and also for confirming the erection or building of two other new pews or seats under two of the arches of the said new gallery, the one on the south side and the other on the north side of the said entrance to the said pit, at the west end of the nave of the said church, and for appropriating and confirming as well the said original and new galleries as also the said pews or seats on the south side of the said addition to the aforesaid pit, and the said pew under one of the said arches, to wit, that on the south side of the entrance of the said pit, to and for the use of the said chancellor, master and scholars, and their successors, exclusive of all others,"—request *J. S.*, the vicar-general of the Bishop of Ely, and official principal of the consistorial and episcopal court of Ely, to grant to the said chancellor, masters and scholars, letters of request to Sir *Herbert Jenner*, Knight, official principal of the Arches Court. That the letters of request were granted and presented on the 1st May, 1837, to Sir *H. Jenner*, Knight, official principal of the Arches Court of Canterbury, and that on that day the chancellor, masters and scholars, by their proctor, did then allege before the official principal of the Arches Court of Canterbury, that a faculty, dated the 24th July, 1738, was granted, by the then vicar-general of the Bishop of Ely, and official principal of the consistorial and episcopal court of Ely, to the chancellor, masters and scholars of the said University, to appropriate to them and their successors, exclusive of all others, a space in the middle aisle or nave of the said church, called the Master of Arts' Pit; that another faculty of the same date was granted for adding to the Master of Arts' Pit, and for appropriating the same to the said chancellor, masters and scholars for ever, exclusive of all others; and

did then allege that the original galleries in the north and south aisles of the said church had from time to time, and at all times since the erection thereof, been exclusively used by the undergraduate members of the University during divine service and sermons, and that they had at all times been supported and repaired by and at the expense of the said chancellor, masters and scholars, when need required; that the chancellor, masters and scholars, had also from time to time largely contributed to the expenses of other repairs, as well as to the expense of building and rebuilding the church; that some time since the chancellor, masters and scholars were desirous, at their sole costs, to make the additions and alterations mentioned in the request to the vicar-general of the Bishop of Ely, and had petitioned the said vicar-general and official principal of the said court of Ely for a faculty for these purposes, and for appropriating and confirming the said additions to the Master of Arts' Pit; and as well the then galleries as the said then intended new gallery, and also the four pews on the south side of the addition, and the two pews under the intended new gallery, for the use of the said chancellor, masters and scholars, and their successors; and that on the 20th July, 1819, a citation issued under the seal of the said court, citing the patrons, vicar, churchwardens and parishioners of the said parish of Great St. Mary to appear and shew cause why the said faculty should not be granted; that the churchwardens appeared on the 2d August, 1819, and alleged an agreement between the said chancellor, masters and scholars, and the said parish; and that on the 30th October, 1819, it then appearing that it had been so agreed upon between the said chancellor, masters and scholars, and the said churchwardens and parishioners, the surrogate of the said vicar-general and official principal of the said court of Ely decreed a faculty to be granted to the said chancellor, masters and scholars, for the purposes following, to wit, at the sole costs and charges of the said chancellor, masters and scholars, to enlarge the Master of Arts' Pit (as before set out

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in the request), and also for appropriating and confirming the said then intended addition to the Master of Arts' Pit, and as well the then galleries as the said new galleries, when erected, and also four pews on the south side of the said addition, to the use of the said chancellor, masters and scholars, and their successors, exclusive of all others (the four pews on the north side of the said addition, when so erected, being for the use of the parishioners). And they did also allege, that no faculty had, in pursuance of the said decree, been hitherto granted, but that shortly after the making of the said decree, the said chancellor, masters and scholars had, at their own expense, made the said additions and alterations.

The declaration went on to state, that after these allegations had been so made, Sir *H. Jenner*, official principal of the Arches Court of Canterbury, accepted the letters of request, and decreed a citation of the perpetual curate and the churchwardens and inhabitants of the parish to appear and shew cause why a faculty should not be granted to the said chancellor, masters and scholars, for confirming the hereinbefore mentioned additions and alterations, so as aforesaid made in the said church, to wit, the enlargement of the Master of Arts' Pit by 13 feet; the erection of the said four pews on the south side, and of four pews on the north side of the said enlargement; the removal of the staircases unto the galleries in the north and south aisles, and the organ loft; the removal of the organ into the tower; the erection of a gallery for the choristers; the prolongation of the galleries in the aisles, and their continuation across the west end of the nave; the erection of new staircases with the several galleries at the west end of the side aisles from the archways in the porch; and of a new staircase to the organ loft and belfry; for the removal of the consistory court, seats, presses, documents and records, into the opposite aisle; the building of three arches of stone for the support of the new gallery across the nave; and for confirming the erection of two other new pews under two of

the said arches of the new gallery, one on the south side and the other on the north side of the entrance to the pit; *and for appropriating and confirming* as well the said original and new galleries, as also the said four pews on the south side of the addition to the pit, and the said pew under one of the arches on the south side of the entrance to the pit, *to and for the use of the said chancellor, masters and scholars, and their successors, exclusive of all others.*

The declaration then stated that the cause was then instituted, and that on the 6th June, 1837, the plaintiffs appeared and prayed to be heard against issuing the said faculty, and that on the 29th June they delivered their act on petition in objection to the issue of the faculty, alleging (among other things) that the church was built in 1519, and the steeple in 1593, and the bells hung in the tower at the costs of the parishioners, aided by voluntary contributions, and that they have been since principally, if not solely, repaired by means of rates on the parishioners; that the parishioners are unable to obtain suitable accommodation for attending divine service in the church, by reason that the said chancellor, masters and scholars, who were non-parishioners, do in fact, though unduly, keep and appropriate, and have long unduly kept and appropriated a large space, called the Masters' Pit, in the nave or body of the church, and the northern and southern galleries, as also, within the last few years, the western gallery (the north and south galleries, with the pit, being capable of holding 900 persons), to their own sole use, to the entire exclusion of the parishioners, and in manifest derogation of their rights; that before 1836, there were only 44 pews for the parishioners, and that the churchwardens have since built 24 new pews by a rate; that the 68 pews contain only 250 persons, the population being between 800 and 900, and that no more can be built; that there are no free sittings; that the said chancellor, masters and scholars, to wit, such of them as are resident in the University, reside in their colleges and halls, or in lodgings, not one of which colleges and halls is within the parish,

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but the whole claim to be extra-parochial, paying no parochial rates; that their proctor submitted that under the circumstances a faculty, appropriating to the University other parts of the parish church, in addition to the Masters' Pit and north and south galleries, ought not to issue, and prayed *that right and justice might be done to the parish*, and the University be condemned in costs.

The declaration then stated the answer of the chancellor, masters and scholars, alleging (in substance) that the church had been from the earliest period used by the University, without asking permission, for sermons and University exercises, and for all other purposes, when by the statutes and usages of the University or otherwise a church was required, and that no other church was used for such purposes; that by a statute of the University, passed between 1303 and 1306, every person taking the degree of D. D. should preach a Latin sermon in the church, on a day assigned by the chancellor; that by another statute, on four days in each year, Latin sermons to the clergy should be preached by the chancellor or a D. D.; that prior to the year 1306, and long before the present church was built, the sermons and exercises of members proceeding to the degree of D. D. were preached and performed in the old church, and are now preached and performed in the new; that the chief expenses of building the church and steeple were defrayed by the University, and by benefactions obtained by it (stating them); that the church has been commonly called the University Church; that occasionally before the year 1640, and regularly since that year, the University hath twice in each year commemorated in the said church the benefactors to the building as benefactors to the University; and that by an ancient statute of the University, every bachelor, on taking his degree, should pay 4*d.* to the repair of the said church, and the same hath been constantly paid. That the answer then stated the two faculties of the 24th July, 1738, and the petition of 1819, to the court of Ely, for a faculty to confirm the decree; that no faculty actually issued, but

that the alterations and additions, authorised by the decree to be made, were done at the expense of the University; that the University built two new pews under the arches of the new gallery, it having been agreed that one should be for the use of the University and the other for the use of the parish; it stated that the pit and galleries would hold no more than 750 persons; that the resident members are between 1500 and 1750 in number, and had no other church to resort to for hearing sermons; it denied that the parishioners could not obtain accommodation by reason of the University appropriating the Master of Arts' Pit and the galleries to their own use as alleged (stating the mode of performing divine service and the attendance); it alleged that the organ and clock in the church are the property of the University; that the parishioners have been allowed the use of the Master of Arts' Pit and the galleries, when the members of the University did not attend; that the parishioners, in addition to the 45 pews, have the use of six more in the chancel; that since 1836 they have the use of 75 pews; that the University have been accustomed to contribute largely to the repair of the church, sometimes one-third and latterly two-thirds of the expense; that the University has made no encroachments in the church, and that the alterations and additions, for which this faculty is sought, did not interfere with the sittings; that the expenses amounted to 2500*l.*; that, though none of the colleges or halls are situate within the parish, the University is a body corporate; that it has a fixed locality, and extends over the whole town of Cambridge, including the said parish, and that the said chancellor, masters and scholars, in their corporate capacity, are rated to the church and poor rates of the parish, in respect of a house now pulled down, situate within the parish, and prayed that the faculty might be granted.

The declaration then set out the reply of the now plaintiffs, denying that the chief expense of building either the church or steeple was defrayed by the University; denying that the faculties, dated the 24th July, 1738, were lawfully

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granted, and stating that the northern and southern galleries were not built, nor had they been since repaired, at the expense of the University, but by the parishioners, for the use of the under graduates; denying that the parishioners have the use of six pews in the chancel, or that the University has contributed one-third or two-thirds of the expense of repair as alleged; and denying that the organ or clock is the property of the University. The declaration then stated that Sir *H. Jenner*, the official principal, &c. received the said act on petition, answer and reply, and that the said suit is now at issue in the said Court of Arches; that the official principal decreed that the cause should be proceeded with, and that it is now pending and being proceeded with in said Court, &c. Therefore, and because the granting of such a faculty as that prayed for by the University in the said cause, &c. is not the subject of ecclesiastical cognisance and jurisdiction, the plaintiffs pray judgment of this Court that a writ of prohibition may issue, &c. &c.

General demurrer and joinder.

Sir *W. W. Follett*, in support of the demurrer (*a*). On this declaration the defendants are entitled to judgment; 1st, because no excess of jurisdiction appears; 2dly, because the grant of a faculty is in the discretion of the ordinary. The plaintiffs are premature. No excess of jurisdiction is disclosed by the declaration, or appears on the face of the proceedings below; the plaintiffs submitted and prayed the judgment of the Court below, and thereby admitted their cognisance of the cause. In *Blacket v. Bli-zard* (*b*), the prayer was to dismiss the suit, but the libel was admitted; that was a step towards an excess of jurisdiction. In *Burder v. Veley* (*c*), the illegality of the rate was apparent on the face of the proceedings. It will be contended, however, that the grant of a faculty to a corpo-

(*a*) The case was argued before  
 Lord Denman C. J., *Patteson*,  
*Williams* and *Wightman* Js.

(*b*) 9 B. & C. 851.

(*c*) 9 Law Journ. (N. S.) Q. B.  
 267; S.C. 4 P. & D., not yet rep.

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ration not resident is contrary to law, and that this Court will interfere when the spiritual court is proceeding towards an illegal act. But prohibition will not lie for a faculty; *Com. Dig. Prohibition* (G 3). In this case also the faculty prayed for is twofold in its object, to confirm the alteration of the pews, and to appropriate them. If the second is doubtful, the first is exclusively matter of ecclesiastical cognisance, and this Court will not presume that the faculty, if granted, will not be confined to the former object only; *Hall v. Maule* (a). In *Byerley v. Windus* (b) the spiritual court was proceeding to try a title by prescription, which could not be properly tried there, and which is triable at common law only. Here the case is otherwise. *Chesterton v. Farlar* (c) is a strong authority; there the suit was depending, and, though the rate was clearly illegal, yet, as the suit was before a court of competent jurisdiction, prohibition was refused. So in *Griffin v. Ellis* (d), where the rate was clearly illegal, this Court would not interfere, though the responsive allegation below was admitted to proof. Where the Court below has original jurisdiction, the party seeking a prohibition must wait for sentence, or some manifestly illegal act. None such appears here. If the spiritual court has granted an improper faculty, the temporal courts cannot interfere. They cannot control the discretion of the ordinary (e).

*Kelly* contra. Either party to the suit below may have prohibition; *Com. Dig. Prohibition* (E); *Darby v. Cosens* (f). The ordinary has not jurisdiction over all pew rights; he cannot grant a faculty to "one and his heirs;" *Com. Dig. Prohibition* (E & G 3); *Brabin and Tradum's case* (g). A faculty to a corporation and their successors, as prayed in

(a) 7 A. & E. 721; S. C. 3 N. & P. 459.

(b) 5 B. & C. 1; 7 D. & R. 564.

(c) 7 A. & E. 713; S. C. *Reg. v. Judic. Comm.* 3 N. & P. 15.

(d) 3 P. & D. 398.

(e) The argument as to the legality of the faculty is omitted, as the judgment of the Court proceeds upon the other point.

(f) 1 T. R. 552.

(g) Poph. 140.

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the suit below, is open to the same objection. But conceding that there is original jurisdiction in the ordinary to grant or refuse a faculty, yet, if the temporal courts see that the faculty about to be granted is contrary to law, they will prohibit before sentence. *Burder v. Veley* (a) is decisive on that point. In *Chesterton v. Farlar* (b), *Hall v. Maule* (c), and *Griffin v. Ellis* (d), which were cited to shew that the plaintiffs were premature, the courts below had jurisdiction over the subject-matter. But here the jurisdiction to grant this faculty in the terms prayed is denied. The faculty would be void at law. Prohibition is therefore *ex debito justitiæ*, *Com. Dig. Prohibition* (C); even where the temporal court has not cognizance of the matter of the libel; *Com. Dig. Prohibition* (F 1), *Scammell v. Wilkinson* (e), *Darby v. Cosens* (f).

Sir W. W. Follett in reply. There is no authority that prohibition will lie against the grant of a faculty. In *Brabin and Tradum's case* (g), the grant was enforced by excommunication, which was ground of interference, as contrary to the ecclesiastical law: see also *Langley v. Chute* (h). A temporal right, as a right of action, must be touched before prohibition will issue: *Bulwer v. Hase* (i), per Lord Ellenborough C. J. In *Darby v. Cosens* (f) a *modus* was set up, which put an end to the jurisdiction. In *Gould v. Capper* (k) the bounds of a parish were a question. In *Scammell v. Wilkinson* (e), which appears adverse, the allowance of proof of a will, by the canon or civil law, might prejudice common law rights. None such can be prejudiced by this faculty, the disposal of pews being matter of spiritual cognizance only. But supposing that part of the faculty, viz. the grant

(a) 9 Law Journ. (N. S.) Q. B. 267; S. C. 4 P. & D. not yet rep.

(b) 7 A. & E. 713; S. C. *Reg. v. Judic. Comm.* 3 N. & P. 15.

(c) 7 A. & E. 721; S. C. 3 N. & P. 459.

(d) 3 P. & D. 398.

(e) 2 East, 552.

(f) 1 T. R. 552.

(g) Poph. 140.

(h) Sir T. Ray. 246.

(i) 3 East, 217.

(k) 5 East, 370.

of a pew to a non-resident corporation, is illegal, this Court will not interfere at this stage. In *Burder v. Feley* (a), the spiritual court had pronounced in favour of an illegal rate.


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Lord DENMAN C. J., at the sittings after this term (May 10), delivered the judgment of the Court as follows:— This is a demurrer to a declaration in prohibition, upon the hearing of which many more cases were cited, and a much wider range of argument was gone into, than we feel it necessary to notice in the judgment which we are about to give.

The declaration discloses that the church of St. Mary's at Cambridge is a parish church; that the greater part of it has for four or five centuries been occupied by the members of the University, but, as the plaintiffs allege, unduly, since they are not parishioners nor occupiers of any house or houses in respect of which they claim any prescriptive right. That a faculty was granted by the ecclesiastical court of Ely, in the year 1738, but, as the plaintiffs allege, illegally, by which a part of the nave, called the Masters of Arts' Pit, and the north and south galleries were appropriated to the members of the University. That in the year 1829, the University were desirous of extending the Masters of Arts' Pit and the galleries, and erecting eight new pews, four on each side of the extension to the Masters of Arts' Pit, and also two new pews in a part of the porch of the church, for which purpose they were desirous of removing the organ from its then position into the tower, and making some alterations. The declaration also discloses an agreement by the churchwardens and parishioners that these things should be done, but alleges that upon application for a faculty to the ecclesiastical court at Ely some differences arose as to part of the expense being borne by the parish, and as to the appropriation of one of the proposed new pews in the porch. It discloses that a faculty was decreed, but never actually granted, for making the proposed alterations, and for appro-

(a) 9 Law Journ. (N. S.) Q. B. 467; S.C. 4 P. & D., not yet rep.

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priating the proposed extensions of the Masters of Arts' Pit and the galleries to the members of the University. That the alterations were accordingly made at the expense of the University, and that in the year 1837 the University obtained letters of request from the ecclesiastical court at Ely to the Court of Arches, and prayed in the latter court for a faculty confirming the alterations, and appropriating the extensions to the members of the University. It then alleges that citation issued from the Court of Arches to the perpetual curate, churchwardens and parishioners of St. Mary's, that the plaintiffs appeared and petitioned against the faculty; the petition is set out, the answer of the University, and the reply of the plaintiffs.

Upon these documents the facts above set forth appear uncontradicted; other facts are disputed, but they are none of them of an exclusively temporal nature, neither do they appear to be in themselves very important. The declaration then states that the cause is pending, and being proceeded with in the Arches Court, *wherefore, and because the granting of such a licence or faculty as that prayed for by the said chancellor, &c. is not the subject of ecclesiastical cognisance and jurisdiction*, the plaintiffs pray the judgment of this Court, and that her Majesty's writ of prohibition may issue.

To this declaration there is a general demurrer.

Now it appears that the faculty prayed for has two objects; first, the confirming alterations in the church made by the University, by agreement with the parishioners; and secondly, the appropriating the extensions to the members of the University.

It is not pretended that the granting a faculty as to alterations in a church, and as to the distribution of seats in general, is not matter of ecclesiastical cognisance; neither is it pretended that there is any thing objectionable in the faculty now prayed for, as far as the first object of it goes.

The whole objection rests upon the second object, and cases are cited to shew that a faculty appropriating a pew to a man and his heirs is bad; that it cannot be granted

except as annexed to the occupation of a house *in* the parish, and that no person can claim a pew in respect of a house out of the parish, except by prescription. Therefore it is said this faculty asks too much; it asks that which cannot be legally granted in any view of the case, that which the ecclesiastical court has no jurisdiction to grant, and therefore this Court is called upon to prohibit the ecclesiastical court from entertaining the suit for the faculty altogether.

This is obviously premature: this Court has no power to prohibit the ecclesiastical court from granting a faculty to confirm the alterations which have been made; the suit therefore must proceed quoad them, in order that the ecclesiastical court, within whose proper jurisdiction that matter is, may determine whether the faculty shall be granted or not. With respect to the other object of the faculty, assuming, for the sake of the argument, that the extensions cannot be legally appropriated as prayed, and also assuming that a prohibition will lie in respect of an application, *ex gratiâ*, for a faculty *before* it is granted, which is by no means a clear point, still we are not to presume that the ecclesiastical court will not take care to limit the faculty (if any be granted) to those objects which may be legally embraced in it. The case of *Byerley v. Windus* (a), which appears the nearest in point to the present, was decided entirely upon the ground that an issue was raised in the ecclesiastical court upon a question of fact, which could only be tried by a jury in the temporal court. In the present case, no temporal right is in issue, and nothing is attempted to be drawn from the temporal courts "*ad aliud examen*." We are therefore of opinion that the declaration does not shew any sufficient grounds for the writ of prohibition, and that judgment must be given for the defendants.

Judgment for the defendants.

(a) 5 B. & C. 1; S. C. 2 D. & R. 23.

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In trespass quare clausum fregit the plaintiff described the locus in quo as part of the seabeach, and lying between high water mark and low water mark, and abutting landwards towards the north on five closes particularly described. Upon the trial it appeared that these abutments were not immediately contiguous to the locus in quo, but that there intervened a waste strip of shingle, which was no part of the sea beach. Held, that the abutments were not proved.

## WEBBER v. RICHARDS.

**TRESPASS** quare clausum fregit. The only pleas material to notice were not guilty and not possessed. Issue thereon.

The plaintiff having obtained a verdict at the trial before Coleridge J. at the Devonshire summer assizes, 1839, under the circumstances fully set forth in the judgment of the Court, a rule nisi for a new trial was granted the Michaelmas term following, on the ground that the verdict was against evidence, the plaintiff not having proved his abutments,

*Erle, Bere, and M. Smith* now shewed cause against the rule. They cited *Tapley v. Wainwright (a)*, *Bond v. Downton (b)*, *Nowell v. Sands (c)*.

*Greenwood* contra, appeared to support the rule, but the Court said they would call upon him on a future day if it should be necessary to hear him.

*Cur. adv. vult.*

Lord DENMAN C. J. at the sittings after this term, (May 10) delivered the judgment of the Court. This was a rule for a new trial, the action was in trespass, and, the first two pleas being not guilty and not possessed, the question is, whether the close in which the trespasses are laid is properly described in the declaration. The description is as follows:—"a close situate in the parish of Georgeham, in the county of Devon, being part of the sea beach, and lying between high water mark and low water mark there, and abutting landwards and towards the north in part upon a certain kiln of the plaintiff in the occupation of one *John Brayley*, in other part upon certain land of the plaintiff in the occupation of the said *John Brayley*, in other part upon a certain road called Middleborough Lane,


(a) 5 B. & Ad. 395; S. C. 2 N. & M. 697.


(b) 2 A. & E. 26.

(c) 2 Roll. Abr. 678.

otherwise Freshwell Lane, in other part upon a certain messuage and premises in the occupation of *Robert Bragg*, and in the remaining part landwards and towards the north upon a certain estate of the defendant called Middleborough, and abutting seawards on low water mark."

Upon the opening of the case it appeared that the action was brought for the erection of a lime kiln, the making a cart road across the sea shore to the sea, and the placing some heaps of lime stone, the cargo of a vessel, on the soil between high and low water mark. From the evidence the tract in which the alleged trespasses were committed was shewn to be near the sea, on the north of which the land was divided into two farms, the easternmost belonging to the plaintiff, and in the occupation of *John Brayley*, that on the west belonging to the defendant, and called Middleborough. These farms were separated by the lane called Middleborough Lane, or Freshwell Lane, running north and south. South of these farms was a strip of shingle and rock between them and the high water mark; the lime kiln of the plaintiff was built on the edge of his farm in the occupation of *Brayley*, that alleged to have been built by the defendant was in a corresponding situation on the edge of the Middleborough Farm; the road charged to have been made was formed in continuation of the Middleborough Lane to the high water mark across the strip of rock and shingle; the lime stone had been deposited between high and low water mark in front of the plaintiff's farm. Upon this state of facts the judge told the jury that the plaintiff was limited to the proof of trespasses between high and low water mark, and therefore put out of their consideration the building of the lime kiln, and the making of the road, unless any part of it should appear to have been carried below high water mark, and this ruling was acquiesced in by the plaintiff; the judge added that, although the plaintiff could shew no trespass committed in a close between high and low water mark with its abutments corresponding in every particular with the description in the de-

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claration, (as for example, no such close could be shewn abutting anywhere on the plaintiff's lime kiln,) still, if there was such a correspondence in the most numerous and important details, as made it clear that the defendant could not be misled, he thought that would be sufficient. The attention of the jury was therefore directed to two questions of fact, whether the space between high and low water mark was the soil of the plaintiff, and whether the strip between it and the farms was also his; and in considering the present point it must be taken that the jury have rightly found both these questions in favour of the plaintiff. The plaintiff contends that the trespasses in building the lime kiln and making the road being laid out of the case, and the phrase "the close in which, &c." being limited to the place in which a trespass is proved, according to the decision of this Court in *Tapley v. Wainwright* (a) he has sufficiently satisfied his description, as to the depositing the lime stones, by shewing that done on a spot between high and low water mark abutting northward on the plaintiff's land, meaning thereby the strips of shingle and rock before mentioned. But there was no evidence to shew that that strip was in occupation of *John Brayley*, and contrary inference was rather to be drawn from many parts of the evidence. Even however, if that difficulty were removed, it would appear that of five abuttals towards the north, stated to belong to one entire close, one only would have been found to correspond; and if we adopt the ruling of the learned judge, which is as favourable to the plaintiff as can be safely laid down, we think there is not such a substantial correspondence between the description and the proof as secures the defendant from being misled. There is, however, another circumstance to be borne in mind, that this description remaining entire, and the verdict being allowed to stand, there might be evidence on the record against the defendant on some future day directly contrary to the fact.

(a) 5 B. & Ad. 395; S. C. 2 N. & M. 697.

The case of *Nowell v. Sands* (a) was cited for the plaintiff, in which it is said to have been decided that an abuttal "on the south side on a mill" was sufficiently proved by shewing the mill on that side of the close, although a highway ran between them. If this were the whole description, we do not agree with the decision; it is probable, however, that there were other corresponding particulars making the whole so clear as to come within what we conceive to be the true rule—that the party is not to be turned round on account of some minute variance in one out of several particulars, but that there must be a general accurate correspondence, faithfully describing the close in substance, and conveying full information to the defendant of the place in which he is alleged to have committed the trespass.

We think this has not been done in the present case, and make the rule absolute for a new trial.

D.

Rule absolute for a new trial  
without payment of costs.

(a) 2 Roll. Abr. 678.

The QUEEN, on the prosecution of ARMSTRONG and  
another, v. FALL and others.

Jan. 12th  
and May 10th.

RULE to shew cause why an order of Lord Abinger C. B. should not be set aside. The order directed that the ver-

On the trial of  
issues joined  
on a traverse  
of a return to a

writ of mandamus, which commanded a scrutiny to be had of the poll at an election of parish officers, the jury found a verdict for the prosecutors, but there was no express finding of damages. The judge before whom the trial was, afterwards directed the verdict to be entered on the postea, with one shilling damages: Held, that he had authority to do so, and that it was a proper case for the exercise of it.

The prosecutors in such a case are entitled to recover damages by force of the statutes 9 Anne, c. 20, s. 2, and 1 Will. 4, c. 21, s. 3, though they have no private or particular interest apart from the general body of parishioners in the matter litigated.

The prosecutors are entitled to the costs of the proceedings as well of the writ as of the subsequent proceedings by the same statutes.

*Quere*, whether there being a return and traverse the Court have a discretionary power over the costs of the writ by the statute 1 Will. 4, c. 21, s. 6, or whether that section is confined to cases in which the writ of mandamus is refused, or issued and obeyed.

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dict found for the prosecutor should be entered on the postea, with one shilling damages. A meeting for the election of parish officers for the parish of St. Mary, Lambeth, had been held, at which the rector who presided directed a poll of the voters to be taken on the three days succeeding the day of the meeting at the church porch. After the poll a writ of mandamus issued from this Court directed to the churchwardens and overseers of the poor of the said parish, commanding them "to attend a scrutiny of the poll so taken at the porches of the parish church, and to produce thereat the poor rate and other books." To this mandamus a return had been made and traversed by *Armstrong* and another, who had been appointed to be the prosecutors of the traverse. The case was tried before Lord *Abinger* at the Surrey assizes, when his lordship directed a verdict for the crown on all the issues. The verdict was taken accordingly, and a minute made by the associate in the following words, "verdict for the crown." The learned judge also certified on the back of the record that the case was proper to be tried by a special jury. Before any postea was formally entered, the prosecutors proceeded to tax their costs, but the master refused to do so, because upon the production of the record, with the minute of the associate thereon, it did not appear that any damages were found by the jury. Upon this a summons was taken out before Lord *Abinger*, who, after hearing counsel, ordered that the verdict should be entered with 1s. damages.

A rule was granted to shew cause why that order should not be set aside, on the grounds, 1st, That the order was void, inasmuch as it was in effect to amend the postea, when there was nothing to amend by: and 2ndly, That no damages could be given, inasmuch as it appeared by the writ of mandamus that the matter complained of was one of a public nature, regarding the rights of the parish at large, and not one by which the prosecutor had individually sustained any particular damage.

The *Attorney-General*, *Thesiger*, and *Swann* (a) shewed cause. Conceding that the Court, out of which the record issues may revise the exercise of the judge's discretion who tried the cause in amending of the postea, this is not a case in which the Court ought to do so. It is clear that a judge has power to direct the postea to be amended by making it conformable to the intention of the jury: *Eddowes v. Hopkins* (b), *Spencer v. Goter* (c), *Mellish v. Richardson* (d), *Ernest v. Brown* (e), *Empson v. Griffin* (f), *Reg. v. Virrier* (g). It cannot be supposed that it was the intention of the judge and the jury to give no damages, and thus make the whole proceedings a nullity, which without an entry of damages they would be, as in *Kynaston v. The Mayor of Shrewsbury* (h). It was a mere form to inquire whether the jury gave nominal damages, it was a matter of course that they should do so. The prosecutor being entitled by law to recover damages as a plaintiff in an action on the case for a false return might do, he is entitled to nominal damages on shewing that he is entitled to have the verdict entered for the crown at all. The proof of an injuria giving a right to a verdict gives with it a right to nominal damages: *Feize v. Thompson* (i), *Cotterill v. Hobby* (k), *Marzetti v. Williams* (l), *Fogarty v. Smith* (m).

Before the stat. 9 Ann. c. 20, s. 2(n), no damages could

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(a) In Hilary term last, Jan. 19th.

(b) 1 Doug. 376.

(c) 1 H. Bl. 78.

(d) 7 B. & C. 819.

(e) 4 Bing. N. C. 162.

(f) 3 P. & D. 160.

(g) 4 P. & D. 161.

(h) 2 Str. 1051.

(i) 1 Taunt. 121.

(k) 4 B. & C. 465; 3 C. 6 D. & R. 551.

(l) 1 B. & Ad. 415.

(m) 4 Dowl. P. C. 595.

(n) "And be it further enacted

by the authority aforesaid, that from and after the said first day of Trinity term, as often as in any of the cases aforesaid, any writ of mandamus shall issue out of any of the said Courts, and a return shall be made thereunto, it shall and may be lawful to and for the person or persons suing or prosecuting such writ of mandamus, to plead to, or traverse all or any of the material facts contained within the said return; to which the person or persons making such return shall reply, take issue, or demur; and

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be recovered; nor since that statute could damages be given where the question was merely one of public right, the recovery of damages in that form of proceeding being substituted for an action on the case, but the stat. 1 Will. 4, c. 21, s. 3 (a), in express terms extends the power of traversing and recovering damages to all other writs of mandamus.

*Sir F. Pollock and Hayes in support of the rule. The*

such further proceedings and in such manner shall be had therein, for the determination thereof, as might have been had if the person or persons suing such writ had brought his or their action on the case for a false return; and, if any issue shall be joined on such proceedings, the person or persons suing such writ shall and may try the same in such place as an issue joined in such action on the case should or might have been tried; and, in case a verdict shall be found for the person or persons suing such writ, or judgment given for him or them upon a demurrer, or by nil dicit, or for want of a replication or other pleading, he or they shall recover his or their damages and costs in such manner as he or they might have done in such action on the case as aforesaid; such costs and damages to be levied by *capias ad satisfaciendum*, *feri facias*, or *elegit*; and a peremptory writ of mandamus shall be granted without delay for him or them for whom judgment shall be given as might have been if such return had been adjudged insufficient; and, in case judgment shall be given for the person or persons making such return to such

writ, he or they shall recover his or their costs of suit, to be levied in manner aforesaid."

(a) "And whereas the provisions contained in a certain act of parliament passed in the ninth year of the reign of Queen Anne, intituled 'An Act for rendering the Proceedings upon Writs of Mandamus and Informations in the Nature of a Quo Warranto more speedy and effectual, and for the more easy trying and determining the Rights of Offices and Franchises in Corporations and Boroughs, relating to the Writs of Mandamus therein mentioned, have been found useful and convenient, and the same ought to be extended to the Proceedings on other such Writs;' be it therefore enacted, That the several enactments contained in the said statute relating to the return to writs of mandamus, and the proceedings on such returns, and to the recovery of damages and costs, shall be and the same are hereby extended and made applicable to all other writs of mandamus, and the proceedings thereon, except so far only as the same may be varied or altered by this act."

judge was not warranted in making the amendment. There was nothing to amend by, and the amendment was not an alteration to carry into effect the intention of the jury, for neither judge nor jury supposed at the trial that damages ought to be found. Indeed it appears from the affidavit that, even when the parties were before the judge on the application for the amendment of the *postea*, he did not consider that any damages should be found by the jury, until his attention was directed to the case of *Kynaston v. The Mayor of Shrewsbury* (a), and he then took upon himself to do that which ought to have been done by the jury at the trial. The present case is therefore distinguishable from all that have been cited. What took place here is just what occurred in *Kynaston v. The Mayor of Shrewsbury* (a), and it was never supposed in that case that the judge might of his own authority amend the defect.

But, secondly, the amendment was unjustifiable, for the parties traversing the writ were not legally entitled to recover any damages. The question in the present case relates to the mode of electing parochial officers, and the traversers state themselves to be two inhabitants of the parish; the question is therefore one of a public nature, and unaccompanied by any private damage. At common law, in such a case, an action for a false return was not sustainable, there being no individual damage, and the proper remedy was an information for the false return, on which a fine might have been imposed: *Rex v. Surgeons' Company* (b) *Rex v. Overseers of Spotland* (c). The stat. 9 Ann. c. 20, s. 2, which first gave the right to traverse, enacts that the party traversing shall recover damages and costs, "in such manner as he might have done in an action on the case for a false return." And that statute was confined to corporate offices, with respect to which an action on the case for a false return was always sustainable by the party claiming

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(a) 2 Str. 1051.

(b) 1 Salk. 374.

(c) Lee's Ca. temp. Hard. 184.



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the office. All therefore that the 9 *Anne* did, was to substitute the shorter process of a traverse for the circuitous mode of proceeding by action; but it made no alteration in the legal rights of the parties. The stat. 1 *Will.* 4, c. 21, s. 3, merely extends the enactments of the stat. of *Anne* relative to returns and the recovery of damages and costs to all other writs of mandamus. It must therefore be considered as if the language of the stat. of *Anne* had been re-enacted by the last statute, and the consequence would be to give the same right to recover damages and costs as the party had in an action on the case for a false return. But in cases in which no such action was maintainable, no damages could be recovered; and therefore they cannot be recovered on a traverse. The right to recover damages is essentially a private right, and it would be a violent construction of the 1 *Will.* 4, the intention of which was merely to shorten the mode of proceeding, to hold that it gave a right to recover damages where no legal damage had been sustained. If this statute authorises a traverse in all cases, the right to recover damages on such traverse ought to be confined to those cases in which an action was maintainable; and in cases where no action could be maintained, but the only remedy was an information, no damages ought to be recoverable on a traverse. Upon this construction of the statute the omission to find damages at the trial was correct.

*Cur. adv. vult.*

LORD DENMAN C. J. delivered the judgment of the Court (a). After stating the facts as above given his lordship proceeded thus:—A rule nisi having been obtained to set aside the order, the case has been argued before us, and it has been contended, 1st, That the order of the Lord Chief Baron was void, inasmuch as it was in effect to amend the *postea*, when there was nothing to amend by: and 2ndly, That no damages could be given, inasmuch as it appeared

(a) In Hilary term last, Jan. 30.

by the writ of mandamus that the matter complained of was one of a public nature, regarding the rights of the parish at large, and not one by which the prosecutors had individually sustained any particular damage.

As to the first, the entry of nominal damages in such a case as the present is quite of course and entirely a matter of form, in which the jury could not exercise any discretion: the omission to mention nominal damages to the jury, and to enter them as part of the associate's minute, was purely accidental, and it cannot be doubted that the learned judge intended to direct the jury to give such nominal damages. He has made the order to enter them with that full impression; and in such a case we think that the memory of the learned judge is sufficient without anything written whereby to amend the record; added to which, the very certificate for the costs of the special jury may, we think, be treated as a document whereby to amend the record, since that certificate would be wholly inoperative unless damages were given, for without damages there can be no costs. We are, therefore, of opinion, that the learned judge was well warranted in making this order in furtherance of what was plainly intended, and did, in substance, take place at the trial of the cause.

As to the second objection, it is undoubtedly true that at common law the return to this mandamus could not have been traversed, neither could the prosecutors have brought any action on the case for a false return, because they had not individually sustained any particular damage. The only remedy would have been by information for a false return, in which no damages would have been recoverable. All this is abundantly clear, from the case of *Rex v. Overseers of Spotland* (a).

It is equally clear that the stat. of 9 Ann. c. 20, s. 2, giving the power of traversing the return to a mandamus, applies only to cases where an action on the case for a false

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return would lie at common law. The statute is pointed to individual damage; and expressly enacts that the prosecutor shall recover damages as he might have done in an action on the case. Under this statute if a verdict be taken for the crown upon a traverse, without damages, it is a nullity, and upon a writ of error a venire de novo must be awarded. This appears from the case of *Kynaston v. The Mayor of Shrewsbury* (a). But this is a traverse under the stat. 1 Will. 4, c. 21, s. 3, which extends the provisions of the statute of *Anne* to all writs of mandamus.

The defendants contend that, though the words of this statute are general, yet that, as the provisions extended by it relate only to cases where an action on the case would lie, the general words must necessarily be restrained to all writs of mandamus where the prosecutor might maintain an action on the case, though they should not relate to franchises in corporations, to which the statute of *Anne* was confined, and that such extension was all that was intended by the statute 1 Will. 4. We do not agree to this view of the statute 1 Will. 4, which we consider to embrace, not only in terms, but in spirit and intention, all writs of mandamus whatever. The objection, however, goes beyond the question of damages, and amounts to a denial that any traverse could legally be taken to the return to such a mandamus as the present, and, as the want of individual damage appears on the record, the objection is on the record, and we are not called upon strictly to dispose of it upon the present motion. The defendants, however, contend further, that, assuming the statute 1 Will. 4 to embrace all writs of mandamus, yet that it must be taken as substituting the traverse for an action on the case, where such action would lie, and for an information where it would not, so that in the one case damages would be recoverable, in the other not. We cannot at all accede to this reasoning, or suppose that the legislature intended to give the prosecutor of such a writ of

mandamus as the present the power of traversing the return and obtaining a verdict without damages, which verdict would by law, as laid down in the House of Lords in *Kynaston v. The Mayor of Shrewsbury* (a), be a nullity : on the contrary, we are of opinion that the liberty of traversing the return of necessity includes the recovery of some damages, if the party traversing obtains a verdict, and, as upon this part of the argument it must be taken that the statute embraces all writs of mandamus, it follows that it has in effect done away with the distinction with respect to matter of public interest and matter of individual damage, so far as regards the remedy by way of mandamus. For these reasons we are of opinion that the present rule must be discharged.

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Rule discharged.

The master taxed the prosecutor's costs, including the costs of the writ of mandamus. A rule was obtained to shew cause why this taxation should not be reviewed, on the ground that by the stat. 1 *Will.* 4, c. 21, the costs of the writ are in the discretion of the Court, and that the prosecutors therefore were not entitled to them without an order of the Court, which had not been made.

The *Attorney-General*, *Thesiger* and *Swann* shewed cause (b). They contended that there being a traverse and return, the costs attendant on the event, by force of the stat. 9 *Ann.* c. 20, s. 2, extended to all writs of mandamus by the stat. 1 *Will.* 4, c. 21, s. 3, and that the case was not within the 6th section of the latter statute, that applying only to cases omitted in the statute of *Ann.* of writs refused, or issued and at once obeyed.

Sir *F. Pollock* and *Hayes* supported the rule.

*Cur. adv. vult.*

(a) 2 *Str.* 1051.

(b) In Hilary term last, Jan. 30th.

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Lord DENMAN C. J. (a) delivered the judgment of the Court.—This was an application to direct the master to review his taxation, on the ground that he had no authority to tax any costs of the writ of mandamus without a rule previously obtained from the Court for that special purpose.

The writ had issued to the parish officers of Lambeth, whose return to it was traversed and negatived by the verdict of a jury, on a trial of the facts in issue.

The costs of the trial have been awarded: the question whether those of the writ can be included in them depends on the last section of 1 *Will.* 4, c. 21, which, “for making some further provision for the payment of costs on applications for mandamus,” enacts that “in all cases of application for any writ of mandamus whatsoever, the costs of such application, whether the writ shall be granted or refused, and also the costs of the writ, if the same shall be issued and obeyed, shall be in the discretion of the Court, and the Court is thereby authorised to order and direct by whom and to whom the same shall be paid.” But the 3rd section had already provided “that the several enactments contained in the 9 *Ann.* c. 20, relating to the return to writs of mandamus and the proceedings on such return, and to the recovery of damages and costs, are extended to all writs of mandamus and the proceedings thereon.” What then is the enactment in 9 *Ann.* relating to costs? The 2nd section enables the prosecutor of a writ of mandamus to traverse the return, and the defendant to take issue, and directs a trial; “and, in case a verdict shall be found for the prosecutor, he shall recover such damages and costs as he might in an action on the case for a false return.” Now it is clear that this provision was not intended to be repealed by 1 *Will.* 4, the clause of which already cited for making further provision for costs, was evidently designed merely for the cases omitted in the statute of *Ann.* where no writ is granted, or, if granted, is at once obeyed. Whether the words may not extend farther, and give the Court discretionary power over the costs in all cases, may be a question

(a) On Monday, May 10th.

fit to be considered; but nothing requires the exercise of that discretion in all cases. The utmost effect of the words is to permit the Court, on a proper application, to deprive a party of costs. We give no opinion on this point, but are of opinion that, in the absence of such application, the prosecutor succeeding on the trial, as he has done here, is entitled to his costs. The rule must therefore be discharged.

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G.

Rule discharged (a).

(a) See the next case.

### The QUEEN v. KELK.

IN this case a mandamus had issued to the defendant as one of the special commissioners under a drainage act (36 Geo. 3, c. 99,) to swear in a person of the name of *Clarke*, who claimed to have been appointed a special commissioner under the said act. The defendant had returned that *Clarke* had not been duly appointed, and an issue, joined on a traverse to such return, had been found for the crown, subject to a special case. The final result of the proceedings was, that the defendant had judgment (b).

The defendant, on the taxation of costs, was allowed the costs of all the proceedings before and after the issuing of the writ. In this respect the case was the converse of the preceding case, *Reg. v. Fall*, where the costs were taxed by prosecutor.

*Whitehurst* obtained a rule to review the taxation of costs, on the ground that the costs which had been taxed

(b) See the case *Reg. v. Kelk*, 4 P. & D. 185.

on application made to disallow such preliminary costs, under 1 Will. 4.

A mandamus was directed to a commissioner under a drainage act (36 Geo. 3, c. 99), commanding him to swear into office a person claiming to have been appointed such commissioner. He returned that the claimant was not duly appointed; and obtained judgment upon issue joined on a traverse of such return.

By sect. 52 of the act, if judgment is given against the plaintiff in any action, suit or information commenced or prosecuted against any person for any thing done in pursuance of the act, such person is to have treble costs.

Held, that the judgment for the defendant in such proceeding by mandamus did not entitle him to treble costs, as neither his refusal to swear in the claimant nor the making the return to the writ was a thing done in pursuance of the act.

Thursday,  
April 29th.  
Under the 9  
Ann. c. 20,  
and 1 Will. 4,  
c. 21, the par-  
ty, whether  
prosecutor or  
defendant,  
succeeding on  
an issue joined  
upon a traverse  
of a return to  
a mandamus,  
is entitled to  
the costs of  
the application  
for the writ as  
well as the  
costs of the  
subsequent  
proceedings  
without an ex-  
press order of  
the Court.  
*Quere*, whe-  
ther the Court  
have a discre-  
tionary power

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for the defendant, of the application for the writ, could not be allowed without an express order of the Court under 1 *Will.* 4, c. 21, s. 6.

*Waddington* now shewed cause. It has always been the practice under 9 *Ann.* c. 20, s. 2, to tax to the party, obtaining judgment in a case of mandamus, the costs of the application for the writ. The provisions of this statute with respect to costs in corporation cases are, by 1 *Will.* 4, c. 21, s. 4, extended to ordinary cases. By the later statute no provision of the former statute is abrogated respecting costs where a return is traversed, as in the present case, but a new provision is added for allowing costs where the proceedings never reach such traverse. The new provision therefore, even if it makes an order of court necessary for obtaining the costs of the application for a mandamus, does not apply to the present case.

*Whitehurst.* It is not denied that the costs of the writ include, as in the statute of *Gloucester*, the costs of the writ and of all *subsequent* proceedings, but it is denied that the costs of the writ include the costs of *anterior* proceedings. The suing the writ is the commencement of the proceedings mentioned in 9 *Ann.* c. 20, s. 2; and the costs provided for are, at the end of the section, termed the costs of "*suit.*" The Court may *award* the costs of the rule for a mandamus as of any other rule; but the rule for the mandamus being no part of the "*suit*" by mandamus, the costs of the rule cannot be included, as of course, in the costs of such "*suit.*" The true construction of the statutes is, that by the stat. of *Ann.* the costs of the writ and of all subsequent proceedings are to be paid to the successful party where there is a return and traverse, that is, where the writ is not obeyed at once; and the stat. of 1 *Will.* 4 provides for what was an omitted case, viz. the costs of the writ where it is obeyed at once, and places such costs in the discretion of the Court. The same section provides also for what was a subject omitted in toto by the previous statute, viz. the costs of the

rule, and such costs are in all cases submitted to the discretion of the Court. Without an order of the Court therefore they cannot be allowed, and the taxation must be reviewed.

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*Cur. adv. vult.*

*Waddington* also had obtained a cross rule to review the taxation, on the ground that the taxing officer had improperly refused to tax the defendant his treble costs of the proceedings from the traverse downwards under the above drainage act. The 52nd section enacted "that if any action, suit or information, shall be commenced or prosecuted against any person or persons for any thing to be done in pursuance of this act, or in execution of the powers and authorities hereby given and granted, every such suit, action or information, shall be commenced and brought within six calendar months after the fact committed," and the person so sued or prosecuted was to have power to plead the general issue; "and if the plaintiff or plaintiffs shall become nonsuited, or suffer a discontinuance of his, her or their action, suit or information, after the defendant or defendants shall have appeared, or if a verdict shall pass against the plaintiff or plaintiffs, or if upon demurrer or otherwise judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall *have treble costs*, and shall have such remedy for the same as any other defendant or defendants hath or have for costs of suit in any other cases by law."

*Whitehurst* now shewed cause. The provision as to treble costs does not apply to proceedings by mandamus, which is not an "action, suit or information;" and, at the time this provision was made, no such proceeding was known as a traverse to a mandamus of this kind, nor until 1 *Will.* 4, c. 21. Many terms in 36 *Geo.* 3, c. 99, s. 52, are inapplicable to the present case. Mandamus is not an "action, suit or information;" it is a criminal proceeding, put in



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motion by the prosecutor, but the crown is the real party. The terms "done in pursuance of this act," "every such suit, &c. shall be brought within six calendar months after the fact committed," "power to plead the general issue," are also inapplicable.

In *Fletcher v. Wilkins* (a) the Court held that replevin was not an action within 24 Geo. 2, c. 44, s. 6, which provides that no action shall be brought against any constable or other officer for acting under a warrant, unless he refuses a copy of such warrant.

A non-feasance cannot be an act done in pursuance of the act: *Blanchard v. Bramble* (b) and *Atkins v. Banwell* (c); which decided that the statutes 7 Jac. 1, c. 5, and 21 Jac. 1, c. 12, giving double costs to churchwardens and overseers, do not extend to actions brought against them for not paying for goods sold and delivered, Lord *Ellenborough* C.J. observing, in the case first mentioned, "Here all was in the negative; for non-payment is not an act done, but an act forborne to be done." *Umphelby v. McClean* (d) is to the same point; and, in *Herring v. Finch* (e), an action on the case against a mayor for refusing a freeman's vote for the election of mayor, the defendant, after nonsuit, having moved for double costs by statute, on the ground that the mayor had been sued for a matter done by him in his office, the Court thought the statute did not apply to a non-feasance, and refused the application. In *Waterhouse v. Keen* (f), the improper taking of toll by a toll-keeper was held to be "a thing done in pursuance" of the act then in question; but the Court treated the action there, which was assumpsit, as substantially one of trespass, as the toll-keeper had acted *colore officii*. He referred also to *Wright v. Horton* (g).

(a) 6 East, 283.

(b) 3 Mau. & S. 131.

(c) 3 East, 92.

(d) 1 B. & Ald. 42.

(e) 2 Lev. 250.

(f) 4 B. & C. 200; S.C. 6 D. & R. 257.

(g) Holt, N. P. C. 438. See also *Charleworth v. Rudgard*, 1 C., M. & R. 895.

*Waddington* contra. The defendant is entitled to treble costs from the traverse downwards at all events, for to this extent the proceedings have all the qualities of a suit. Mandamus is a proceeding within this act, which applies to proceedings "commenced or prosecuted," and therefore does not exclude criminal proceedings; and, although this act passed before the proceedings by mandamus in a case like the present could have been brought to issue, as in an ordinary action, yet there is no objection on that ground to the application of the act to the present case, because such proceedings are merely a substitute in point of form for the action for a false return, and the substance of the thing remains. "A mandamus is held to be an action within the meaning of this act (i. e. 46 *Geo.* 3, c. 46), when the party pleads, and damages and costs are given to the prosecutor:" 2 *Tidd*, 997 (a), citing 2 *Smith*, 8. By the 9 *Ann.* c. 20, s. 2, the party "suing or prosecuting the mandamus may plead to the return, and the subsequent pleadings are to be conducted as in an ordinary action for a false return, and if the party making the return obtain judgment, he is to have his "costs of suit." If an action for the false return had been directed against the defendant, instead of the substituted proceedings by mandamus under 1 *Will.* 4, c. 21, and damages had been recovered, such damages would have been recovered in respect of his false return, and not for the non-feasance of not swearing in the party elected. The return to the mandamus was a positive act done, and done under the local act, for it was thereby that he was bound to appear and make the return. *Waterhouse v. Keen* (b) and *Greenway v. Hurd* (c) shew that a thing may be "done in pursuance" of a statute although it is not a tort or misfeasance. Any species of conduct *colore officii* is within the act. "A thing is to be considered as done in pursuance

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(a) 9th edit.

(c) 4 T. R. 553.

(b) 4 B. &amp; C. 200; 5 C. 6 D. &amp; R. 257.

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*of the act* when the person who does it is acting honestly and bonâ fide, either under the powers which the act gives, or in discharge of the duties which it imposes :” *Smith v. Shaw* (a). In *Waterhouse v. Keen* (b), *Bayley J.* treats the action in *Umphelby v. M’Clean* (c) as not having been brought for any act done colore officii.

*Cur. adv. vult.*

LORD DENMAN C. J., at the sittings after this term (May 10), delivered the judgment of the Court (d).—Cross rules were obtained in this case for the master to review his taxation. One must be discharged on the grounds already stated in *Reg. v. Fall* (e), which apply equally to the defendant as to the prosecutor, whenever the return to a mandamus is traversed. The other was founded on a claim to treble costs, the defendant, who succeeded on a traverse of the return to the writ of mandamus, being said to be entitled to them as an officer under the local act which appointed him a commissioner. To such officer they are granted, if he succeed in any action brought against him for what he may have done in the execution of that duty.

This mandamus required defendant to swear the prosecutor into the office of commissioner; but the Court was of opinion, on a special case stated after trial, that he was not duly elected, and gave judgment for defendant, who was thereupon entitled under 9 *Ann.* to such costs as he would have obtained if sued for a false return. But, if he had been sued in such action, and had succeeded, we think he would not have been so entitled, the return which he made to the writ not being, by any reasonable construction, an act done in the execution of his office. No case cited for defendant established his right; and the authorities on the other side clearly proved that the privilege of treble costs is

(a) 10 B. & C. 384; S. C. 5 M. & R. 225.

(b) 4 B. & C. 200; S. C. 6 D. & R. 257.

(c) 1 B. & Ald. 42.

(d) Lord Denman C. J., *Patterson, Williams and Wightman Js.*

(e) See the preceding case.

not to be extended by equitable considerations beyond the plain import of the statute.

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Rules for reviewing the taxation of costs so as to disallow defendant's costs of the application for the writ, and to allow him treble costs under statute, both discharged.

D.

The QUEEN v. The Inhabitants of ALL SAINTS in  
 NEWCASTLE-UPON-TYNE.

Saturday,  
 April 24th.

AN order for the removal of *Isabella Turnbull* and her son from the township of Tynemouth, in the county of Northumberland, to the parish of All Saints, was confirmed on appeal, subject to the opinion of this Court upon the question whether pauper and her son having independent settlements could be removed by the same order. The settlements had been gained by apprenticeship with different masters in the same parish.

One order of removal may include two members of a family, although they have independent settlements.

*R. Ingham* appeared in support of the order of sessions, but the Court called upon

*J. Bayley* contra. The case of *The Parishes of Chewton and Compton v. Martin* (a) decides expressly that different persons cannot be removed by the same order upon independent settlements. There it was argued that "the removal of two families by one order is ill: for suppose the removal of one is legal, and the other illegal, and there is an appeal to the sessions as to both, and the order is confirmed as to the one, and reversed as to the other; what is to be done in that case as to costs, the statute of 8 & 9 Will. 3, c. 30, giving costs to the parish in whose favour the appeal is determined, and now the appeal will be deter-

(a) 1 Str. 471.

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mined in favour of neither, and of both; it cannot be said that the order is reversed, because it stands good as to part, and it cannot be said to be confirmed, because it was not held good as to the whole. *Eyre and Fortescue*, justices, were of opinion, that the order was ill, giving this further reason, that the party removed had a right to appeal, for it may be he was removed from his own estate, and then upon his appeal it will consequently draw over the other matter in which perhaps the parties on all sides acquiesce." There is the same difficulty with respect to costs against the parish losing the appeal under 4 & 5 Will. 4, c. 76, s. 82. By sect. 79 "no poor person" is removable except as there directed, and by the interpretation clause "person" includes any body corporate "as well as any individual," but does not include several individuals. This affords an inference that an order should adjudicate upon one settlement only. [Lord Denman C. J. The concluding part of the interpretation gives "person" a plural meaning if required.]

*R. Ingham* contra. The chief justice took no part in deciding the case relied upon against this order of removal. The 4 & 5 Will. 4, c. 76, creates no difficulty, the appeal may be confined to that part of the order which is objected to. In both *Rex v. Inhabitants of Heptonstall* (a) and *Rex v. Inhabitants of Ufculm* (b) the order was sustained for the joint removal of parents together with their children who had settlements of their own.

LORD DENMAN C. J.—An order may be quashed as to part, and held good for the remainder. We cannot say this order is necessarily bad in point of law.

PATTESON, WILLIAMS, and WIGHTMAN Js. concurred.

D.

Order confirmed.

(a) 1 Burr. S. C. 88.

(b) 1 Burr. S. C. 138.

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Thursday,  
May 6th.

The QUEEN v. HAWDON and others.

**HUMFREY** had obtained a rule calling upon the defendants to shew cause why the recognisances of *Hawdon* and another and of their bail, entered into on removing an indictment against *Hawdon* and others by certiorari into this Court, should not be estreated for their default in not paying the sum of 280*l.* 4*s.* 10*d.* pursuant to a rule and allocatur of this Court.

The bail taken on the removal of an indictment by a defendant into this Court, under 5 *W. & M.* c. 11, s. 2, are liable to pay the prosecutor's costs, although there is no undertaking to that effect in their recognisances.

An indictment for libel against *Hawdon* and others, preferred at the Central Criminal Court, had been removed into this Court on the defendants indicted entering into their own recognisances for 80*l.* each, and two sureties in 40*l.* each. Two of the defendants had been afterwards found guilty, and the costs been taxed at the sum above mentioned. The recognisances were in the usual terms under 5 *W. & M.* c. 11, s. 2 and 8 & 9 *Will.* 3, c. 33, s. 2, a form of which appears in *Rex v. Bezan* (a).

One of the defendants shewed cause in person (b). The question was, whether the bail were liable for costs, no such liability for costs appearing on the face of the recognisance itself.

*Humfrey* contra cited *Rex v. Bezan* (a) and *Rex v. Teal* (c).

LORD DENMAN C. J.—The general understanding has been in conformity with those cases, but we must see that the prevailing practice has had a lawful origin.

*Cur. adv. vult.*

(a) 7 Dowl. P. C. 680.

(b) On a former day in this term (April 29) before Lord Den-

man C. J., Patteson, Williams, and Wightman Js.

(c) 13 East, 4.

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Lord DENMAN C. J. now delivered the judgment of the Court. This was an application made to the Court to estreat the recognisance of bail for nonpayment of costs under 5 *W. & M.* c. 11. The application is opposed by one of the defendants, and not by the bail, whose recognisance it is sought to estreat. We are sensible of the objections that may be made to imposing upon such persons an obligation not apparent on their recognisance, but these have been urged on former occasions and overruled. The authorities were admitted after great consideration by *Williams J.* in *Rex v. Bezant (a)*, and we cannot feel ourselves justified in departing from what has been the invariable practice many years.

We will not now estreat the recognisance, but will allow further time, till the first day of next term, for payment of the costs. If they are not then paid the rule must be made absolute.

Rule absolute accordingly.

(a) 7 Dowl. P. C. 680.

Wednesday,  
 April 21st.

LAMB and others v. MICKLEWAITE.

The particulars of the plaintiff's demand stated the action to be brought to recover the sum of 29*l.* 1*s.* 1*d.*, after giving credit for the sum of 928*l.* 8*s.* 11*d.* paid at various times. It appeared that the plaintiff had sold and delivered, in the whole, goods to the amount of 949*l.* 10*s.*, but that part, to the amount of 84*l.* 18*s.*, had been returned to the plaintiff:—Held, that the return did not extinguish ab initio the demand for the goods returned, and that the plaintiff was therefore entitled to recover for the balance above the amount for which credit was given.

**DEBT** for goods sold and delivered. The defendant pleaded *nunquam indebitatus*, and payment of "divers large sums of money, amounting to the sums in the declaration mentioned." The particulars of the plaintiff's demand stated the action to be brought to recover the sum of 29*l.* 1*s.* 1*d.*, being the balance, after giving credit for the sum of 928*l.* 8*s.* 11*d.* paid at various times. At the trial before Lord *Denman*, at the sittings after last term at Guildhall, the plaintiff proved a sale and delivery of goods to the amount of 949*l.* 10*s.*, and it was admitted that a teaurn, part of those goods, of the value of 84*l.* 18*s.*, had been

returned by the defendant to the plaintiff. It was contended that the defendant on this evidence was entitled to a verdict; the price of the goods returned being deducted, the amount of the plaintiff's claim was 864*l.* 12*s.*, and that would be more than satisfied by the payments admitted. The learned judge overruled the objection, and the plaintiff had a verdict for 29*l.* 1*s.* 1*d.*

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*J. Bayley* now renewed the objection on a motion for a new trial, citing *Kenyon v. Wakes* (a) and *Eastwick v. Harman* (b).

PER CURIAM. (c)—There cannot be the least doubt what these particulars meant. The return of the tea urn did not destroy the right of action in respect of it ab initio, but satisfied it. The particulars obviously treat this return as a payment. The deduction of the amount for which credit was given from the whole amount of the plaintiff's demand, including the price of the urn, leaves the balance which is sued for.

G.

Rule refused.

(a) 2 M. & W. 764.  
 (b) 6 M. & W. 13.

(c) Lord Denman C. J., *Patterson, Williams, and Coleridge Js.*

The QUEEN v. The Inhabitants of ST. EDMUND'S,  
 SARUM.

Saturday,  
 April 23d.

APPEAL to the quarter sessions of the county of Wilts, against an order of removal of *Thomas Spragg* and his wife from the parish of St. Edmund's, in the borough of New Sarum, to the parish of Stockbridge, in the county of South-  
 Since the passing of statute 5 & 6 Will. 4, c. 76, the borough sessions have jurisdiction to try appeals against orders of removal; and, whether or not since the passing of that statute they have exclusive jurisdiction over appeals against orders of removal, if they are the next sessions after the order is made, the county sessions have no jurisdiction to try such appeal.



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ampton, at the Michaelmas quarter sessions holden at Marlborough in and for the county of Wilts, 15th October, 1839. The respondents objected that the county magistrates had no jurisdiction to hear the appeal, and that it ought to have been made to the quarter sessions holden for the borough of Salisbury on the 14th October, 1839, that borough possessing a separate Court of Quarter Sessions, under the provisions of 5 & 6 Will. 4, c. 76, s. 103. This objection was overruled: the respondents not being prepared to produce the original examination of *Spragg*, the order of removal was quashed, subject to the opinion of the Court of Queen's Bench as to the question of jurisdiction on the following case:—

“ The borough of New Sarum is one of the boroughs mentioned in the first section of the schedule A. annexed to the act 5 & 6 Will. 4, c. 76. Under the 7th section of the act its boundaries are declared to be the same as the limits settled and described in the act 2 & 3 Will. 4, c. 64. Those limits include the city of New Sarum, the liberty of the close, and part of the parishes of Milford and Fisherton Augur. Previous to the passing of the act 5 & 6 Will. 4, c. 76, creating the borough, New Sarum consisted of three parishes, (of which the respondent parish is one), and was originally incorporated by charter of *Hen. 3*. In the year 1611 a charter was granted by King *James* by the name of the mayor and commonalty of the city of New Sarum, with a perpetual succession and power to the mayor, recorder, and aldermen to inquire, hear, and determine within the city aforesaid, all and all manner of murders, felonies, misprisions, riots, routs, oppressions, extortions, forestallings, regratings, trespasses, offences, and all other things whatsoever, from time to time within the city aforesaid and the liberties and precincts thereof arising and happening, which to the office of a justice of the peace in any manner belong or appertain, or which hereafter shall or may happen to belong or appertain, or which in any manner before justices of the peace ought to be or may be inquired of,

heard, or determined, together with the correction and punishment thereof, and all other things to do and execute within the said city aforesaid as fully and in as ample a manner and form as the justices of the peace of the county of Wilts or elsewhere, with the following non intromittant clause, and "that the justices of the peace of us, our trustees and successors in the county of Wilts aforesaid, or any of them hereafter within the city aforesaid or liberties thereof, shall not in any manner intermeddle nor have or exercise any jurisdiction of any causes, things, or matters whatsoever, which to the justices of the peace of the city of New Sarum aforesaid by virtue of these our letters patent belong or in any manner appertain." Charters of confirmation were also granted by King *Charles* the 1st in 1681, and *Charles* the 2d in 1675, both containing the non intromittant clause. By a writ of privy seal, bearing date the 3d of June, in the sixth year of King *Will.* 4, after reciting that the council of the said borough had, pursuant to the provisions of an act intituled "An Act to provide for Regulation of Municipal Corporations in England and Wales," signified by petition to his majesty in council the desire of the council of the said borough that a separate Court of Quarter Sessions of the peace should continue to be held in and for the said borough, his said majesty granted unto the said borough that a separate quarter sessions of the peace should thenceforth continue to be held in and for the said borough according to the provisions of the said act, and assigned the recorder for the time being of the said borough "to inquire the truth more fully by the oath of good and lawful men of the aforesaid borough, by whom the truth of the matter should be better known, of all and all manner of felonies, misdemeanors, and all and singular other crimes and offences of which justices of the peace might or ought lawfully to inquire, by whomsoever or after what manner soever in the said borough done or perpetrated, or which should happen to be there done or attempted, and of all and singular articles and circumstances, and all other things

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whatsoever that concerned the premises or any of them, by whomsoever and after what manner soever in the said borough done or perpetrated, or which thereafter should there happen to be done or attempted in what manner soever, and to inspect all indictments whatsoever, so before him the said recorder taken or to be taken, or before others late the justices of the peace in the aforesaid borough made or taken and not then determined, and to make and continue processes thereupon against all and singular the persons so indicted or who before the said recorder thereafter should happen to be indicted until they could be taken, surrendered themselves, or should be outlawed, and to hear and determine all and singular the felonies and misdemeanors and offences aforesaid, and all and singular other the premises according to the laws and statutes of England as in the like case it had been accustomed or ought to be done before and by Courts of Quarter Sessions in England, and the same offenders, and every of them, for their offences by fines, ransoms, amerciaments, forfeitures, or other means, as according to the law and custom of England, or form of the ordinances and statutes aforesaid, it had been accustomed or ought to be done, to chastise and punish. Provided always, that, if a case of difficulty upon the determination of any of the premises should happen to arise before the said recorder for the time being, then judgment should in nowise be given thereon before him unless in the presence of one of the justices appointed to hold the assizes in the county of Wilts, and thereupon it was commanded that the recorder for the time being to the keeping the peace, ordinances, statutes, and all and singular other the premises, he should diligently apply himself, and that at certain days and places, which he should appoint for that purpose, into the premises he should make inquiry, and all and singular other the premises hear and determine and perform and fulfil them in the aforesaid form, doing therein what to justice appertained according to the law and custom of England, saving unto his majesty the amerciaments and

other things to him therefrom belonging, and it is further commanded by the tenor of these presents that the proper officers of the aforesaid borough, at certain days and places, which the said recorder should make known to them, should cause to come before him the said recorder so many and such good and lawful men of the said borough, by whom the truth of the matter in the premises should be the better known and inquired into." The recorder of the borough of New Sarum is, by virtue of his office, one of the justices of the peace of the borough.

The question for the opinion of the Court is, "whether or not the Court of Quarter Sessions for the county of Wilts had jurisdiction to try these appeals."

*Butt* and *G. F. Moore* (a) in support of the order of sessions. It may be contended that the Court of Quarter Sessions of the county have exclusive jurisdiction over appeals on orders of removal, but it is sufficient, to support this order of sessions, if they have concurrent jurisdiction with the county sessions. The statute of the 8 & 9 *Will. 3*, c. 30, s. 6, is a positive enactment that such appeals shall be tried at the sessions of the county, and therefore, wheresoever the jurisdiction over such appeals might have resided before it passed, it then became vested exclusively in the county sessions; and borough sessions, though the charter of it might contain a ne intromittant clause, could not try such appeals (b). The question therefore depends upon the effect which ought to be given to the Municipal Corporation Act, 5 & 6 *Will. 4*, c. 76, and particularly to the 105th section of it (c). That


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(a) Before Lord Denman C. J., *Littledale, Patteson* and *Coleridge* Js.

(b) Unless that town was also a county in itself; *Rex v. Justices of Carmarthen*, 4 B. & Ald. 291.

(c) "And be it enacted, that the recorder of every borough shall hold once in every quarter of a

year, or at such other and more frequent times as the said recorder in his discretion may think fit, or as his Majesty shall think fit to direct, a Court of Quarter Sessions of the peace in and for such borough, of which Court the recorder of such borough shall sit as the sole judge; and such Court of Quarter

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section says that the municipal sessions shall have cognisance of "all crimes, offences and matters whatsoever, cognisable by any Court of Quarter Sessions of the peace for counties," so that it is an affirmative enactment relating to jurisdictions which before existed in the county sessions; and there is abundance of authority for the proposition, that an affirmative statute does not repeal a prior affirmative law, unless it be inconsistent with it. These statutes may stand well together, by holding either that the county sessions have exclusive jurisdiction, or that they have it concurrently with the municipal sessions. According to the former view, the stat. 8 & 9 Will. 3, c. 30, s. 6, would be considered as a legislative provision on one particular subject only, viz. on the tribunal which alone should try appeals against orders of removal, and the later provisions would be considered as a general enactment as to the jurisdiction of quarter sessions, which, not expressly noticing the earlier enactment, directed to one single subject, would not interfere with it. According to the latter view, even supposing the latter statute to clash with the earlier one in some degree, it would be to the extent only of modifying the previous exclusive enactment, by letting in the municipal sessions to a jurisdiction over those appeals. *Com. Dig. Parliament* (R 9), *Lord Darcy's case* (a), *Viner's Abr.* stat. E 6, *Lyn v. Wyn* (b), *Rex v. Pugh* (c), *Paget v. Foley* (d), are strong

Sessions of the peace shall be a Court of record, and shall have cognisance of all crimes, offences, and matters whatsoever cognisable by any Court of Quarter Sessions of the peace for counties in England, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last-mentioned court: Provided nevertheless, that no recorder, by virtue of his office, shall

have power to make or levy any county rate, or rate in the nature of a county rate, or to grant any licence or authority to any person to keep an inn, alehouse, or victualling house, to sell excisable liquors by retail, or to exercise any of the powers herein specially vested in the council of such borough."

(a) *Oro. Eliz.* 513.

(b) *Judgments of Sir Orlando Bridgman*, 122.


(c) 1 Dougl. 188.

(d) 2 Bing. N. C. 679.

authorities to shew that "a later statute general and affirmative does not abrogate a former, which is particular (a)." Supposing, however, the stat. 5 & 6 Will. 4, c. 76, s. 105, to give a jurisdiction to the municipal sessions to try these appeals, it is still but an affirmative statute, and inconsistent with the stat. 8 & 9 Will. 3, only to the extent of taking away the exclusiveness of the county sessions. A later affirmative statute repeals a prior affirmative only to the extent to which it is inconsistent with it; *Foster's case* (b), *Com. Dig. Parliament* (R 9), *Viner's Abr. stat. E 6*, *Lyn v. Wyn* (c), *Paget v. Foley* (d), *Rex v. Pinney* (e), *Rex v. Leicester* (f). It is true the first section of the 5 & 6 Will. 4, c. 76, repeals so much of all laws, statutes and charters, relating to the boroughs named in the schedule A. and B., of which this is one, but the previous right to have quarter sessions at the county, in respect to this borough, is not inconsistent with the 105th section of the statute. The provision, indeed, does not carry the repeal further than the act itself would do, if it contained provisions inconsistent with a previous statute or charter. The proviso in section 105 is said to shew that every subject of jurisdiction passes to the borough sessions, except those expressly excepted. But the exceptions were intended to prevent the recorder having any jurisdiction over the subjects excepted, such as licensing public houses, which it was never intended by the legislature to give him, and without such express exceptions, the recorder would have had the jurisdiction; *The Queen v. The Recorder of Hull* (g), *The Queen v. St. Lawrence, Ludlow* (h).

Sir F. Pollock and Slade contra. A later statute repeals a prior one, if it be inconsistent with it, or if otherwise an

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|-----------------------------------------------------|------------------------------------------|
| (a) <i>Com. Dig. Parliament</i> (R 9).              | (f) 7 B. & C. 6; S. C. 9 D. & R. 772.    |
| (b) 11 Rep. 63.                                     | (g) 8 A. & E. 638; S. C. 3 N. & P. 595.  |
| (c) <i>Judgments of Sir Orlando Bridgman</i> , 188. | (h) 11 A. & E. 170; S. C. 3 P. & D. 155. |
| (d) 2 Bing. N. C. 679.                              |                                          |
| (e) 2 B. & C. 322; S. C. 3 D. & R. 578.             |                                          |

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intention to abrogate it appear. The first section of the Municipal Corporation Act repeals all "laws, statutes, usages," charters, grants and letters patent, inconsistent with its provision, and the 105th with the proviso, and the 107th and 111th sections abundantly shew the intention to vest in the municipal sessions all the jurisdiction in matters arising within the municipality, over which previously the county sessions had jurisdiction; *Cates v. Knight (a)*, and *Crisp v. Bunbury (b)*. Affirmative words may abrogate prior affirmative words, where an implication arises that they were intended to have that effect. *Cates v. Knight (a)* and *Crisp v. Bunbury (b)* are instances of the application of this rule. But, if the city and the county have concurrent jurisdiction, it is found in this case that the city sessions were those occurring next after the order was made, and to the city sessions the appellants were bound to take their appeal.

*Cur. adv. vult.*

LORD DENMAN C. J., in the Trinity term following (May 29), delivered the judgment of the Court.—The act 8 & 9 Will. 3, c. 30, s. 6, required that the appeal against any order of removal of any poor person from out of any parish, township or place, shall be tried at the general or quarter sessions of the peace for the county, division or riding, wherein such parish &c. doth lie, and not elsewhere, any former law or statute to the contrary notwithstanding.


Thus the trial of an appeal against removal from a parish in any city or town, not being a county of itself, took place at the quarter sessions for the county at large, not at those holden for the town, though the charter might contain a ne intromittant clause

The Municipal Reform Act, by section 103, enables the crown to grant a Court of Quarter Sessions to towns corporate, and appoints the recorder the sole judge in such court.

(a) 3 T. R. 442.

(b) 8 Bing. 394.

Then the 105th assigns to it jurisdiction over all offences "and matters whatsoever, cognizable by any Court of Quarter Sessions of the peace for counties in England," and to the recorder "power to do all things necessary for exercising such jurisdiction."

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The present case is that of an order of removal, made by two justices of the peace for the city of Salisbury, for removal of paupers from a parish in the city, against which an appeal was tried at the October session for the county of Wilts, and there quashed, subject to a case, which stated a very old charter granted to the city, and another much more recent, in the reign of *James the First*, with a ne intromittant clause, and, since the passing of the Municipal Reform Act, the grant of a charter in the usual form, under the 103d section, above quoted.

The question is, whether the 8 & 9 *Will. 3*, which clearly applied to Salisbury before, has been kept alive for the purpose of this trial, notwithstanding the recent charter.

Much learning and great ingenuity were employed in maintaining the affirmative of this proposition, but, while we hold that a positive enactment is not to be repealed by inference, we must also act on the maxim "*Leges posteriores priores contrarias abrogant*," wherever it comes into operation. Here, the quarter session of the city, under its former charters, was deprived of the cognizance of appeals against orders of removal, by the 8 & 9 *Will. 3*. But the Municipal Act gives to the city sessions all the jurisdiction, and to the recorder all the power, that formerly belonged, not to the quarter sessions of a town corporate, but to any county quarter sessions. The use of these words, without reference to the 8 & 9 *Will. 3*, might raise an argument that that act was not in the contemplation of the parliament of 5 & 6 *Will. 4*, though most probably it was, for the strongest objection to local justices of peace was removed by the appointment of a single judicial officer: but, even if this intention were doubtful, the words are not. They give the recorder the trial of all matters that could be tried by a



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county session. This appeal is one of those matters, it is therefore given to the recorder, and the words "not elsewhere," in the statute *Will. 3*, being contrary, are abrogated.

It does not follow that there might not be a concurrence of jurisdictions: but, if there is, the borough sessions were holden earlier than those for the county, and the appeal ought to have been to the former. The rule for quashing the order of sessions must be absolute.

G.

Order of Sessions quashed (a).

(a) See the next case.

The QUEEN v. The Justices of SALOP (b).  
 (The QUEEN v. The Justices of LANCASHIRE.)  
 (The QUEEN v. The Justices of SUFFOLK.)

A borough, with a grant of quarter sessions under 5 & 6 *Will. 4*, c. 76, has exclusive jurisdiction to try an appeal against an order of removal made by borough justices.

*THE Queen v. The Justices of Salop.*]—Mandamus to the defendants to hear an appeal against an order made by justices of the borough of Shrewsbury, for the removal of a pauper from the borough to a parish within the said county.

The return, which set out a charter of *Car. 1*, granted to the borough of Shrewsbury, with a ne intromittant clause, and a grant of quarter sessions and appointment of recorder, under 5 & 6 *Will. 4*, c. 76, was argued on a concilium (c).

It was agreed to be taken as a fact, though there was no statement of it in the return, that the borough sessions took place before the county sessions, which had refused to hear the appeal.

*Corbett*, in support of the return, contended that the preceding case of *Reg. v. St. Edmund's, Sarum* (d), which had decided that the appeal must be taken to the borough sessions, if they were held before the county sessions, would lead to great inconvenience, for, as the appeal must be to

(b) Decided at the sittings after Trinity term, 1841 (June 19).

(c) In Trinity term, June 5, be-

fore Lord Denman C. J., *Patteson*, *Williams* and *Coleridge* Js.

(d) *Ante*, p. 137.

the next sessions, and a notice be given of fourteen days, and the recorder might fix his own time of holding his sessions, the appellant could not, when he had to give his notice, know whether the borough or the county sessions would be the next sessions. If the jurisdiction of the borough and county sessions is concurrent, no greater inconvenience will follow than from the concurrent jurisdiction of the superior courts of law.

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*Phillimore*, contra, contended that, independently of the borough sessions taking place first, they had exclusive jurisdiction. He cited *Brown v. Mac Millan* (a) and *Doe d. Bywater v. Brandling* (b), upon the construction of statutes generally, and *Rex v. Sainsbury* (c), upon the conflict of jurisdiction.

*Cur. adv. vult.*

*The Queen v. The Justices of Lancashire.*]—This was a rule for a certiorari to remove an order of the defendants, at the quarter sessions for the county, quashing an order made by justices of the borough of Liverpool, for the removal of a pauper from the borough to a township within the county. Liverpool had a grant of quarter sessions under 5 & 6 Will. 4, c. 76, and had previously a charter without a ne intromittant clause.

*Starkie* and *Addison* shewed cause (d), and referred to *Blankley v. Winstanley* (e), *Bates v. Winstanley* (f), and *Reg. v. Bridgewater* (g).

*Cresswell* and *Crompton* supported the rule.

*Cur. adv. vult.*

(a) 8 Dowl. P. C. 852.

(b) 7 B. & C. 642; S. C. 1 M. & R. 600.

(c) 4 T. R. 451.

(d) T. T. 1841 (June 11), before Lord Denman C. J., Patteson and

*Williams* Js.

(e) 3 T. R. 279.

(f) 4 Mau. & S. 429.

(g) 10 A. & E. 711; S. C. 2 P. & D. 586.

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*The Queen v. The Justices of Suffolk.*—This was a rule for a mandamus to the county justices to hear an appeal against an order made by justices of the borough of Ipswich, for the removal of a pauper from the borough to a parish within the county. The borough previously had a charter with a *ne intromittant* clause, and under 5 & 6 *Will. 4*, c. 76, had obtained a grant of quarter sessions.

*Prendergast* shewed cause, and *Palmer* supported the rule (a).

*Cur. adv. vult.*

LORD DENMAN C. J. delivered the judgment of the Court in *Reg. v. Salop*.—We have lately held that under the 105th section of the Municipal Reform Act, the Court of Quarter Sessions for the borough has jurisdiction to try an appeal against the removal of a pauper. This case and some others, which have been since argued, require us to determine whether that jurisdiction is exclusive.

The 8th section of 8 & 9 *Will. 3*, c. 30, is cautiously penned, probably to avoid giving offence to the magistrates in limited jurisdictions, but framed in the spirit of jealousy towards them. It found them, when assembled in quarter sessions, empowered to try appeals and other questions in which the members of the court were likely to be interested or prejudiced; and, without naming them, transferred that power to the county sessions, wherein, and not elsewhere, they are from thenceforth to be tried.

Now we have lately shewn and held that those exclusive words are abrogated by the 105th clause of the Municipal Reform Act, which lodges in the hands of the recorder all the powers and functions (with some specified exceptions) that had been transferred to the county sessions by the act of *Will. 3*. It is possible, though highly improbable, that the legislature may have intended to give a concurrent power

(a) T. T. 1841 (June 3).

of trial to two jurisdictions so differently constituted, and thus to open new sources of litigation as to the manner in which, of two competent jurisdictions, one may possess itself of an appeal cause, to the exclusion of the other, and the still more serious doubts on the validity of trials for crimes which fall within the same provision. It is equally possible, and in a less degree improbable, that the intention to prevent these evils may have been entertained, but not carried into effect; or, finally, that the whole subject may have been overlooked. In any one of these cases we should be bound to discover what the law is, and declare it, without any regard to the consequences of its imperfection.

The rules for interpreting statutes have been much discussed in these arguments, but we apprehend that, in applying them to questions on the effect of an enactment, we can never safely lose sight of its object.

We have already referred to that of the stat. *Will. 3.* It was to deprive the borough sessions of their power in certain cases, and this is effected by giving it exclusively to the county sessions. Parliament, in *William the Third's* time, may be supposed to address the borough justices of the peace:—"We cannot trust you with this power. We take it from you and authorise the county justices of the peace to act in your place." But the parliament of *Will. 4* holds the opposite language:—"We wish you to be restored to the jurisdiction of which you were deprived, and have taken effectual means to prevent the abuse which led to the deprivation." Since, then, the object is directly reversed, and the borough sessions empowered to act, we cannot reasonably doubt that parliament designed to put an end to that power, which had been for the first time given to a foreign body, for the purpose of supplying the deficiency of judicature which the exclusion had caused.

The two enactments are substantially but one. "Let *A.* perform the office which we take from *B.*" But when *B.*'s office is revived in him, *A.*'s must cease, as far as the exclusion of *B.* is concerned, and, that exclusion being manifestly

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the sole reason for giving *A.* the office, he is ipso facto deprived by the reappointment of *B.*

The first section of the Municipal Act repeals all former laws that are contrary to its provisions, not indeed going further than the principle of the common law, but explaining, perhaps, why it was not thought necessary to repeal, in express terms, the act of *Will. 3.*

The 111th clause is generally admitted not to apply to the quarter sessions, and to have been framed with special regard to the altered boundary of boroughs, but it certainly furnishes evidence of the desire felt by the legislature to prohibit the county magistrates from interfering with those who had authority in the borough.

Upon the whole, we think that the quarter sessions for the borough of Shrewsbury had exclusive right to try the present appeal, and that this rule for quashing the order of the county sessions must be made absolute.

*D.*

Rule absolute (*a*).

(*a*) See the preceding case, and *Reg. v. Deane, post.*

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**The QUEEN *v.* The Inhabitants of EASTVILLE (*b*).**

Under 4 & 5  
*Will. 4*, c. 76,  
 s. 81, the  
 grounds of re-  
 moval must be  
 stated as ex-  
 plicitly as the  
 grounds of  
 appeal.

Under an  
 examination  
 stating gene-  
 rally that the  
 pauper is set-  
 tled in the ap-  
 pellant parish,  
 the respond-  
 ents will not  
 be allowed to  
 prove a settlement there by hiring and service.

**UPON** appeal against an order of justices for the removal of *Sarah* the wife of *William Thirsting* and her three children from the parish of Friskney to the township of Eastville, both in the parts of Lindsey in the county of Lincoln, the sessions confirmed the order, subject to the opinion of the Court of Queen's Bench on the following case.

In the examination of the pauper, on which the order of removal was founded, she stated as follows:—"My husband, *William Thirsting*, absconded and left me in the

(*b*) Decided T.T. 1841 (May 29).

parish of Friskney about seventeen weeks ago ; I have often heard my husband say (a) that his place of settlement was in Eastville in the said parish ; I have received within the last year from Mr. *Kent*, of Eastville, a Christmas box, which is given to the poor persons that belong to their parish ; and Mr. *Tusting* and Mr. *Cluter*, charge-bearers and inhabitants of Eastville, told me that we (meaning myself and husband) belonged to their parish, and that Mr. *Tusting* said they had taken my husband without any order ; I have been married four years to my said husband last September, and have three children now living with me by him, viz. *Phæbe*, aged about three years, *William* and *John* (being twins), aged seven months, and I am now chargeable to the parish of Friskney."

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The statement of the ground of appeal was as follows :— That the said *William Thirsting's* settlement is not in the said parish of Eastville, as stated in the examination of the said *Sarah Thirsting* ; that the said *Sarah Thirsting* did not receive relief from the inhabitants of Eastville as a poor person belonging thereto, as stated in her examination ; that Mr. *Tusting* and Mr. *Cluter*, or either of them, did not admit that the settlement of the said *William Thirsting* was in the said parish of Eastville, nor was the said *William Thirsting* ever received by the said parish of Eastville as a pauper belonging thereto, without an order of justices, as in the said examination is alleged.

On the trial of the appeal the respondents proposed to prove a settlement gained by the pauper's husband in the appellant township by hiring and service : the appellants objected to the admission of evidence to that effect, citing the 81st section of the 4 & 5 Will. 4, c. 76.

The Court of Quarter Sessions received the evidence. The respondents in addition gave evidence of verbal statements by certain inhabitants and rate payers of the appellant parish, in order to shew admissions by the appellant parish of the settlement of the pauper's husband in their

(a) As to hearsay evidence in these cases, see *Reg. v. Bierlow*, post, 160.

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parish, which evidence was contradicted by other evidence given by the appellants.

The appellants also called witnesses to rebut the proof of a settlement by hiring and service in the appellant parish.

The question for the opinion of the Court of Queen's Bench is, whether the evidence on behalf of the respondents to prove a settlement by hiring and service in the appellant parish was admissible or not.

*Whitehurst* and *Willmore* in support of the order of sessions. The respondents were entitled under their examination to give evidence of a settlement in the appellant parish by hiring and service. It is true that the examination states generally that a settlement has been acquired in the appellant parish without specifying by what means it has been acquired. But the respondents under 4 & 5 *Will.* 4, c. 76, s. 81, are not bound to supply their grounds of removal with the same particularity which is required from the appellants in their statement of the grounds of appeal: *Rex v. Kelvedon* (a). Generality in the examination, as appears from that case, does not preclude the respondents from going into evidence in support of their examination. *Rex v. Mislerton* (b) and *Ex parte Broseley* (c) were decided on the ground that the evidence did not support the examination, but was inconsistent with it. [*Coleridge J.* I think I was wrong in the distinction I took in *Rex v. Kelvedon* (a), as to the 4 & 5 *Will.* 4, c. 76, not tying the respondents down to the same particularity as it does the appellants.] If the examination is too general, the appellants should have objected to it on that ground in their notice, instead of taking issue on the facts contained in the examination. All the respondents had to do at the trial was to prove the issue taken, as in any ordinary action. The appellants could not

(a) 5 A. & E. 687; S.C. 1 N. & P. 109.

P. 8.

(c) 7 A. & E. 423; S. C. 2 N.

(b) 6 A. & E. 878; S. C. 2 N. & P. 355.

go into this objection, of which they had given no notice :  
*Rex v. Bromyard* (a) and *Rex v. Withernwick* (b).

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*Wildman*, contrà, contended that the distinction pointed out in *Rex v. Kelvedon* (c) could not be sustained, and that the generality objected to in this examination would be fatal to a statement of grounds of appeal, referring to *Reg. v. Whitley Upper* (d), *Reg. v. Justices of West Riding* (e), *Reg. v. Middleton Teasdale* (f), and *Reg. v. Bridgewater* (g).

LORD DENMAN C. J.—The objection was distinctly taken at the trial, and it ought to prevail notwithstanding *Rex v. Kelvedon* (c).

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

D.

Order of Sessions quashed.

(a) 8 B. & C. 240; S. C. 2 M. & R. 280.

(b) 6 A. & E. 273; S. C. 3 N. & P. 423.

(c) 5 A. & E. 687; S. C. 1 N. & P. 138.

(d) 11 A. & E. 90; S. C. 3 P. & D. 81.

(e) 10 A. & E. 685; S. C. 3 P. & D. 462.

(f) 10 A. & E. 688; S. C. 3 P. & D. 473.

(g) 10 A. & E. 693.

## REYNOLDS v. NEWTON.

Saturday,  
May 8th.

SIR W. W. FOLLETT, on a former day in this term, had obtained a rule ordering a writ of habeas corpus cum causâ to issue to the Marshal of the Marshalsea, to bring up the defendant, with a return, &c., and ordering the plaintiff, and also the plaintiffs in about ten other actions, to shew cause why the defendant should not be discharged out of custody.

The following are the material facts of the case :—on the 7th January last the defendant was arrested on a ca. sa. at the suit of one *Phillips*; writs of execution in the other

Where a party arrested under a ca. sa. is discharged on the ground of privilege, the writ is not executed, and he may be retaken under it when his privilege expires.

Where a party, against whom there

are several writs of ca. sa. in the sheriff's office, is taken under one of them in execution of a judgment not duly revived by scire facias, the arrest, though illegal, is not illegal from any wrongful act on the part of the sheriff, and therefore enures as a good arrest under all the other writs.



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actions also were in the hands of the sheriff previously to the arrest. *Patteson J.*, at chambers, had discharged defendant from the execution at the suit of *Phillips*, on the ground that the judgment, which was more than a year old, had not been revived by *scire facias*, but the learned judge was of opinion that the same ground did not extend to invalidate the execution of the other writs, and that the detention of the defendant under them was legal. As to these writs therefore the defendant was remanded.

As to *Reynolds v. Newton* and four others of the above actions, the defendant also applied to the same learned judge for his discharge on another ground, viz. that he had previously been taken under a *ca. sa.* in *Reynolds v. Newton* on the 28th February, 1840, at which time writs of *ca. sa.* in the said four other actions also were in the sheriff's hands, and that he had been discharged from these writs (by *Tindal C. J.* at chambers) as being a barrister, at the time of the arrest, on his way to join circuit (a). He therefore contended, before *Patteson J.*, that the writs in these five actions had already been executed, and could not authorise his present detention. The learned judge dismissed the application, being of opinion that the writs in question were still in force.

The present motion had for its object the discharge of the defendant from all the executions except that in *Phillips v. Newton*, which had already been held bad for want of the *scire facias*.

Crompton, E. V. Williams, Barstow, Butt, and W. H. Watson, now shewed cause in the different actions. The defendant is not entitled to his discharge; although he was illegally taken in satisfaction of the stale judgment in *Phillips v. Newton*, yet his detention in these actions is legal, because the original arrest was not illegal by the wrongful act of the sheriff himself. The general rule, that where the

(a) As to the privilege of a barrister see *Newton v. Constable*, *post*.

sheriff has several writs against a party and arrests on one writ he arrests also on all the others, together with the exception that the arrest does not so enure to the other writs if it was illegal by the wrongful act of the sheriff himself, is established by *Barratt v. Price* (a), *Robinson v. Yewens* (b), *Collins v. Yewens* (c), *Pearson v. Yewens* (d), *Barclay v. Faber* (e), *Hutchins v. Kenrick* (f), and other cases. The writ in *Phillips v. Newton* would have protected the sheriff if he had been called to account for making the arrest. This shews that the arrest was not illegal by his wrongful act. The sheriff was not only authorised but bound by the writ to arrest. The arrest was good as regards the sheriff, and, indeed, with reference even to the plaintiff, execution on a judgment not revived by scire facias is not void, but voidable by writ of error; 2 *Wms. Saund.* 6 a, n. *Bushe's case* (g) was "debt upon an escape against a sheriff. He pleads nihil debet; and by verdict it was found that the plaintiff recovered against J. S. in debt, and after the year passed had a *capias ad satisfaciendum* against him, and the sheriff by force of it took him, and suffered him to escape; and if upon this matter he was chargeable for this debt was the question; and it was adjudged he should; for though the process was erroneously awarded, yet it was sufficient for the sheriff to arrest him, and he might justify in a false imprisonment, and therefore cannot let him at large."

Sir *W. W. Follett* and *Atherton* contra. The circumstance that no action will lie against the sheriff affords no criterion of the validity of the arrest for any purpose, for the sheriff may be protected though acting under a writ that is void. "If a writ of execution bear teste out of term, the sheriff is justifiable, and yet shall not be liable in an action of escape, for it is a void writ;" per *Holt* C. J. in *Shirley v.*

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(a) 9 Bing. 566.

(b) 5 M. & W. 149.


(c) 10 A. & E. 570; S. C. 2 P. & D. 439.

(d) 5 Bing. N. C. 489.

(e) 2 B. & Ald. 743.

(f) 2 Burr. 1051.

(g) Cro. Eliz. 188.

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Wright (a). If there was no valid judgment to warrant the defendant's arrest, the arrest and all that depends on it is void. *Mortimer v. Pigott* (b) shews that execution of a judgment more than a year old, and not revived by scire facias, is not merely voidable but a nullity. The original arrest then being a nullity, what becomes of the detainers? It seems from *Frost's case* (c), "that where a man is in custody of the sheriff by process of law, and afterwards another writ is delivered to him to arrest the body of him who is in his custody, presently he is in his custody by force of the second writ, by *judgment of law*, although he do not actually arrest him." Since, therefore, where an arrest has been made on one writ, the arrest on the others is by intendment of law and relation to the first writ, if the first writ is gone, the others have nothing to relate to, and they cannot have an independent operation, because no arrest is actually made, or otherwise than by relation. The case would be different if there had been actual arrest, but there was only one warrant in this case, and only one actual arrest, viz. in *Phillips v. Newton*. In *Ex parte Ross* (d) (and *Ex parte Hawkins* (e) is to the same effect), where a bankrupt was arrested while in attendance on the commissioners, Lord Eldon C. said, "It has repeatedly been determined that, if the arrest is bad, all the other writs are rendered inoperative as detainers; nor can there be any difference whether such writs were lodged *before* or *after* the arrest. It is the arrest alone that gives efficacy to the detainers; and, if it be illegal, it can give effect to nothing." These two cases also furnish instances where the criterion proposed on the other side fails; no action could have lain against the sheriff for the arrest, and yet the detainers were held bad. *Spence v. Stuart* (f) is another case of the same class. [*Patteson J.* In those cases the privilege which in-

(a) 2 Salk. 700.

(b) 2 Dowl. P. C. 615; S. C. 4
 A. & E. 363, n.

(c) 1 Coke, 89 a.

(d) 1 Rose, 260.


(e) 4 Ves. 691.

(f) 3 East, 89.

validated the arrest would apply equally to the detainers.] The only *warrant* on which this defendant was taken being good for nothing, the existence of other *writs* can make no difference. In *Barclay v. Faber* (a), and *Davies v. Chippendale* (b), where the detainers were supported, the original arrest was irregular only and not void, and in *Howson v. Walker* (c) the officer in the second action had a warrant, and made an actual arrest, and without collusion.

The defendant is at all events entitled to his discharge from the five writs which were in the sheriff's hands when the arrest was made in February, 1840, for those writs are dead. In *Rol. Abr.* 903, it is said that, if a defendant adjudged to account is arrested for not accounting properly, and afterwards released by privilege of parliament, he may be taken again afterwards on a special writ, reciting the special matter. By 2 *Jac.* 1, c. 13, after reciting that it was doubtful whether a person arrested in execution, and released for privilege of parliament, could be ever taken again on a new writ, it is enacted that the plaintiff, in such a case, may have a new writ of execution when the privilege ceases. It seems, therefore, that in an ordinary case, having nothing to do with privilege of parliament, the defendant cannot be taken again, or that, at all events, a fresh writ would be necessary for the purpose. Unless the sheriff could have returned non est inventus to these writs, it follows that they were executed.

Lord DENMAN C. J.—It is gratifying to hear points concerning the liberty of the subject argued with so much zeal and ability. But I am clearly of opinion that the defendant cannot avail himself of any of the objections urged against his detention. The defendant claims his discharge on the ground that the writ in the first action was a nullity, because the judgment was more than a year old and had not been revived by *scire facias*. That writ may have been

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(a) 2 B. & Ald. 743.

(c) 2 W. Bl. 823.

(b) 2 B. & P. 282.

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a nullity as regarded the plaintiff in the action, but it was not a nullity as regarded the sheriff. The sheriff was bound to arrest under that writ; and the defendant's detention under the other writs is perfectly legal. Where a sheriff, having several writs, arrests a party under one of them, it is said that it is only by fiction of law and relation that he arrests under the other writs also. But it is not, in my opinion, any fiction of law, or relation or intendment. The question is, what authority has the sheriff at the time of the arrest. He has the authority of all the good writs in his hands at the time, and it does not signify which of the writs he chooses to act upon. Where the sheriff indeed acts in the first instance collusively or misconducts himself, his subsequent acts, which cannot be supported without taking advantage of his original wrong, are null and void, and cannot protect him.

It is also contended, as to some of the writs under which the defendant is now detained, that they have already been executed and could not be executed a second time. My brother *Patteson*, when the case was before him at chambers, was of opinion that a writ, the execution of which is set aside on the ground of privilege, is still in force. I am of the same opinion. The statute of *James* relates entirely to privilege of parliament, and cannot be taken as a declaration that a new writ is necessary wherever any ordinary execution has been set aside on the ground of privilege. The whole matter is this: facts which are known to the party arrested, but not to the sheriff, are communicated to the judge, and he allows the party to go at large to exercise his privilege, but the writ is not executed.

PATTESON J.—The point of privilege was fully argued before me at chambers, and I remain precisely of the same opinion as formerly, that the writs, as to which the defendant was discharged for privilege, have not been executed. No one ever dreamt that where a party was discharged

from execution for the purpose of any ordinary privilege, as attendance on court, the debt for which he was taken was discharged. The statute of *James* applied to members of parliament, and cleared up doubts respecting the legality of arresting them again after they had been once discharged for privilege. It is said that, though fresh writs might have issued in the actions in which the defendant was discharged, the writs under which he has once been detained have discharged their office, and cannot serve again. It may be that there are no instances where a party has been taken a second time under the same writ, but that may be accounted for. Formerly writs were returnable at a time certain, and, if that ran out before the privilege expired, a fresh writ would be necessary.

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WILLIAMS J.—The principal question is shortly this: what is the effect of an arrest by a sheriff when he has several writs in his office. It is clear from the authorities that an arrest on one of them is an arrest on all, subject to the qualification in *Barratt v. Price* (a), that the actual arrest must not be illegal by the wrongful act of the sheriff.

WIGHTMAN J.—It is consistent with all the authorities to say that where the sheriff arrests on one of several writs in his hands, which is good on the face of it, and not known to the sheriff to be tainted with any irregularity, he arrests on all the other writs also. On the other hand, where the sheriff is guilty of a wrongful act in arresting on the first writ, then the detention on the other writs is also wrongful.

Rule discharged.

(a) 9 Bing. 566.

END OF EASTER TERM.

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SITTINGS AFTER EASTER TERM.

*Monday,
May 10th.*

An order of removal cannot be made upon hearsay evidence alone.

The QUEEN v. The Inhabitants of ECCLESALL BIERLOW.

ON appeal against an order for the removal of *William Chappell*, *Esther* his wife, and their three children, from the township of Dodworth to the township of Ecclesall Bierlow, both in the West Riding of Yorkshire, the Court of Quarter Sessions for the said riding, holden on the 6th of July, 1840, confirmed the order, subject to the opinion of this Court on the following case:—

The only examinations whereon the said order was made, were examinations of the pauper's father, and of the pauper himself, and were in the words following;—

“The examination of *William Chappell* of Cawthorne, mason, touching the place of his son's legal settlement, taken upon oath before us, two of her Majesty's justices of the peace, acting in and for the said riding, the 26th day of February, 1840, who saith as follows:—‘I am sixty-two years of age, and was born at Doncaster in the said riding, but the place of my father's settlement was at Ecclesall Bierlow in the said riding, *as I have heard him say*, and believe to be true, and *I have heard my father say* that he has had relief from the overseers of Ecclesall Bierlow aforesaid, and I never did any act in my own right to gain a settlement. About thirty-eight years ago I was married at Cawthorne church to *Martha Robson* my now wife, by whom I have six children; and I have a son named *William*, aged thirty-two years, and who is now ill, and resides in Dodworth, but who never was an apprentice or did any act in his own right to gain a settlement, and that he is now actually chargeable to Dodworth aforesaid.’

“The examination of *William Chappell* the younger, of Dodworth, (the pauper) touching the place of his settlement, taken upon oath before us, two of her Majesty's justices of the peace acting in and for the said riding the 26th day of February, 1840, who saith as follows:—‘I am thirty-two

years of age, and was born at Cawthorne in the said riding, but the place of my father's settlement, as *I have heard him say*, and believe to be true, is at Ecclesall Bierlow in the said riding. I have heard the above examination read over to me, and I believe the same to be true, and that I never did any act in my own right to gain a settlement. I was married at Silkstone church about seven years ago to *Esther Hobson* my now wife, by whom I have three children, namely, *Charles* aged seven years, *Eliza* aged five years, and *Rachael* aged about one year, and that I am poor and actually chargeable to Dodworth aforesaid.' "

A copy of the said order of removal, and of the said examinations, whereon the said order of removal was made, and a notice of chargeability, were sent to the appellants, as prescribed by the statute 4 & 5 Will. 4, c. 76, s. 79.

The appellants duly gave a notice of appeal, which contained the following grounds of appeal:—

That the place of the legal settlement of the said *William Chappell* and *Esther* his wife and their three children, in the said examinations, or either of them, upon which the order of removal in this case was made, is mentioned, is not now, and was not at the time of the taking the said examinations, or either of them, or at the time of the making the said order of removal, in the said township of Ecclesall Bierlow.

That the place of settlement of the grandfather of the said pauper *William Chappell* was not in the said township of Ecclesall Bierlow, nor had he, the said grandfather, relief from the overseers of Ecclesall Bierlow aforesaid, as in the said examinations, or either of them, in this case is mentioned, nor otherwise, nor was the place of settlement of the father of the said pauper *William Chappell* at Ecclesall Bierlow aforesaid, as in the said examinations, or either of them, is also mentioned.

That the said order of removal in this case is bad and inoperative, and *the examinations on which it is made are defective*, and insufficient to ground and support the same.

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On the hearing of the said appeal at the said Court of Quarter Sessions, the counsel for the appellants insisted, before any evidence was heard, that the order of removal in question should be discharged, inasmuch as the examinations whereon it had been made were insufficient to support it.

The grounds of the insufficiency relied on were, first, that *the examinations contained no legal evidence* of the pauper's settlement being in the appellant township; and secondly, that, even if there were any such evidence, it was confined to the naked fact of relief having been given to the pauper's grandfather by the appellant township, and that it ought to have appeared on the examinations in what township or place the pauper's grandfather was residing when such relief was given. The Court of Quarter Sessions decided that these objections to the examinations did not afford a sufficient ground for discharging the order, and proceeded to hear the appeal, and, having heard it, confirmed the order of removal.

If the Court of Queen's Bench should be of opinion that the objections insisted on by the counsel for the appellant township, or either of them as above stated, ought to have prevailed, then the original order of removal, and the judgment of the Court of Quarter Sessions confirming the same, shall be quashed; and if the Court of Queen's Bench should be of the contrary opinion, then the said order of removal and the said judgment of the Court of Quarter Sessions shall be confirmed.

Erle and W. Walker, in support of the order of sessions. The sessions rightly overruled the objection that the order of removal was made upon hearsay evidence. Hearsay evidence is sufficient to support a commitment for felony, *Cave v. Mountain*(a). If an order of removal cannot be made upon hearsay evidence alone, it must be contended that the admission of any particle of hearsay evidence will vitiate the order, although there may have been sufficient legal evidence also taken, for it cannot be ascertained on

(a) 1 M. & Gr. 257; S. C. 1 Scott, N. R. 132.

which portion of the whole evidence the justices have proceeded. Is an order then to be quashed because the attesting witness is not called to prove an indenture of apprenticeship, or because secondary evidence, or an instrument wrongly stamped, or the testimony of a felon convict, as in *Reg. v. Alternun(a)*, has been improperly admitted?

But the statement of the pauper himself, so far from being hearsay evidence, is in the nature of an admission by the party against whom the order is made, and consequently the best evidence. In the preliminary inquiry before the justices, the pauper and the respondent parish are the contending parties. The respondent parish complains against the pauper under 13 & 14 Car. 2, c. 12, which treats him as a person who has come to despoil a foreign parish. It seems that because the pauper is the party complained against, that it has been considered proper, although not absolutely necessary, that the pauper himself should have notice, and be heard before removal; *Rex v. Wykes(b)*; *Anonymous(c)*; *Rex v. Bagworth(d)*; *Rex v. Everdon(e)*. The statute of Car. 2 seems to have contemplated nothing more than a summary jurisdiction, and that it should be put in motion by the mere complaint of the parish officers, which need not be on oath; *Rex v. Standish with Langtree(f)*; and see *Rex v. Southwold(g)*; for, although it has been held (*Munger Hunger v. Warden(h)*) that the statute requires an examination to be taken on oath before making the order, yet the terms of the statute do not seem to require this.

Before the Poor Law Amendment Act, then, (4 & 5 Will. 4, c. 76,) it would seem that the order might have been made upon the mere complaint against the pauper. What alteration has been made by this statute? By sect. 79 a pauper cannot be removed until twenty-one days after notice

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(a) 10 A. & E. 699.

(b) Andr. 238.

(c) Comb. 478.

(d) Cald. S. C. 179.

(e) 9 East, 101.

(f) 1 Burr. S. C. 150.

(g) 1 Burr. S. C. 140.

(h) 2 Sess. Ca. 40.

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of chargeability, together with a copy of the order of removal and of the examination upon which the order was made, shall have been sent to the parish to which the order is directed. By sect. 80 the officers of the latter parish giving notice of appeal may have access to the pauper to examine him concerning his settlement. By sect. 81 the appellant parish is to give notice of its grounds of appeal, and to be restrained at the trial from going into any other grounds than those of which notice has been given, and on the other hand, the respondent parish is to be confined to the grounds of removal stated in the order and examination. But these provisions apply entirely to the proceedings to be had after the order of removal has been made, and cannot therefore affect in any way the mode of taking the examination before the order is made. The respondents are to be confined to the *ground* stated in their order and examination, but not to the *evidence* on which the order is founded. They may bring forward any additional evidence at the trial before the quarter sessions, where the parties to the inquiry are the appellant parish against the respondent parish, instead of the removing parish against the pauper. [*Patteson J.* If the examination is as general as the order, no information is given to the parish to which the order is directed, for they have no right of access to the pauper, unless they give notice of appeal. But they ought to have some information of the case against them during the twenty-one days given them for the purpose of considering whether they will appeal or not.] Before the new act, the order might have been made on the pauper saying merely that he was settled in a particular parish. All that the examination is required to state is the ground of settlement, just as the declaration states the ground of action, not the evidence by which it is to be supported. The various cases decided on the sections above cited have established that explicit notice must be given, on the one hand, of the settlement upon which the order is made, and on the other, of the grounds of appeal, and also that there must not be a vari-

ance between such notice and the evidence given at the trial, but it has never been decided that the particular evidence as to the material fact in issue is to be mutually disclosed between the parties beforehand; and indeed the law seems to discountenance such a practice, lest it should lead to the tampering with witnesses. In *Rex v. Keldon* (a) the order was made upon hearsay evidence, and it has been the uniform practice to act upon such evidence in these cases. It is unjust that the removing parish should be permanently charged with a pauper, because the justices, acting as a preliminary tribunal, have received inadmissible evidence. The case should be sent back to them. The recent statute 3 & 4 Will. 4, c. 40, concerning the removal of paupers born in Scotland and Ireland, recognises the legality of hearsay evidence, for by the form of examination, given in the schedule, it is enough for the pauper to state he was born in either of those countries, according to the best of his knowledge and belief.

It is an insuperable objection, to any interference with the ordinary practice of making orders of removal upon hearsay evidence, that the magistrates have no power to compel the production of evidence.

Cresswell and *Pashley*, contra, were not heard.

Lord DENMAN C.J.—I have no doubt whatever that the magistrates should have the usual kind of legal evidence before making an order of removal. Their order is a warrant to the parish officers to remove the pauper, and should not issue except on legal evidence. It is said that the pauper is a party before the magistrates, and that his hearsay statement is in the nature of an admission. I do not think that he is a party, and, even if he were, his statement of what he had heard some one else say would not be evidence against him. The objection pointed out is a good ground of appeal, and we must give effect to it.

(a) 5 A. & E. 687; S. C. 1 N. & P. 138.

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PATTESON J.—Whatever the case may have been formerly, it is clear that since the 4 & 5 Will. 4, c. 76, the litigating parties are the two parishes. The argument that the pauper is a party, and that nothing can be stronger than his bare admission, goes too far, for, if he had stated positively that he was settled in A., that would not do; the ground of settlement would still have to be stated, and to be supported by legal evidence. It is said that inconvenience will ensue from our requiring legal evidence, as an indenture of apprenticeship or other evidence may have to be sent for from a great distance. But, if the case goes to the sessions, the sessions must have legal evidence; the witnesses must be produced at some time or another. The appellants have clearly pointed out the objection, and it must prevail. If a removing parish think their evidence will not do, they should abandon their order, and apply for another when they can get better evidence.

WILLIAMS J.—The object of the sections that have been commented on, of the new act, are decisive to my mind. They were intended to prevent litigation, by making the case of each party known to the other. Now an order of removal made upon hearsay evidence is, for this purpose, as if made upon no evidence; for the legal evidence, which must afterwards be adduced at the trial, would come upon the appellants by surprise.

WIGHTMAN J. concurred.

Order of Sessions quashed (a).

(a) In *The Queen v. The Inhabitants of Tetbury*, decided the same day and on the same point, Lord Denman C. J. observed during the argument, "We have not yet said, and should be unwilling to say, that an order of removal

would be vitiated because part of the evidence taken has been improperly admitted by the removing justices." See also the next case, *The Queen v. The Inhabitants of Lydeard St. Lawrence*.

The QUEEN v. The Commissioners for Paving
CHELTENHAM (a).

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Wednesday,
April 28th,
and
Saturday,
May 1st.

A RULE had been obtained, in Michaelmas term last, to shew cause why an order (which had been brought up by certiorari), made at the Gloucestershire general quarter sessions, in April, 1840, should not be quashed. By the order in question the sessions had, on appeal, quashed a rate, made by the defendants the 3d of January, 1840, upon certain occupiers in the town of Cheltenham, under 1 & 2 Geo. 4, c. cxxi. (local and personal, public), intituled "An Act for better paving, lighting, cleansing, watering, and improving the town of Cheltenham, &c."

A statute taking away certiorari will not prevent this Court from setting aside the judgment of an inferior Court, in a case of malversation.

The affidavits, on which the rule was granted, stated that an unusually large number of magistrates, amounting to about thirty, had attended at the trial of this appeal, which lasted three days. That on the first day two objections were taken, under the special provisions of the above statute, on behalf of the respondents, against the jurisdiction of the sessions to hear the appeal. That upon the motion of one of the magistrates they retired to a private room to consider these objections, and afterwards returned to Court and overruled them. That deponents were informed and believed that a discussion and division took place when the magistrates so retired, and that five magistrates (naming them), who were assessed to the rate, took part in such discussion and division, and voted against the objections.

Where, at the quarter sessions, some of the justices voted in support of an order in which they were interested, held, that the Court was improperly constituted, and a case of malversation made out; and the order having been removed, notwithstanding a statute taking away certiorari, was quashed.

That, on the second day, another objection, which had a most important bearing on the result of the appeal, was taken by the respondents to the reception of certain evidence. That the magistrates again retired, and, on their return to Court, overruled the objection. That deponents were informed and believed that a discussion and division took place on this occasion also; that the chairman, who

(a) *Reg. v. The Inhabitants of Lydeard St. Lawrence*, which should have followed *Reg. v. Ecclesall Bierlow*, will be found *post*, 191.

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did not vote, was of opinion that the objection was good; that eight divided in its favour, and eleven against it. That deponents were informed and believed that three magistrates voted with the majority on this occasion, who, though not assessed by name to the rate in question, were directly interested in quashing the rate, as being shareholders or partners in certain companies, carrying on business in buildings, which were occupied by their servants, for the purposes of such business, their servants being assessed in respect of such occupation, and the amount of the assessment paid out of the funds of the companies. The companies so referred to were the Cheltenham and Gloucester Tram-road Company, the Gloucestershire Banking Company, and the National Provincial Bank of England. The same three magistrates were stated to have taken part in the proceedings on the first day also.

That on the third day the magistrates retired to consider their final judgment, when a discussion took place; that they afterwards divided in open Court, and decided, by a majority of ten to five, that the rate should be quashed. That deponents were informed and believed that two of the said three magistrates, so interested as being members of companies contributing to the rate, took part in the discussion on this day also, and voted with the majority.

Affidavits, in opposition to the rule, made by magistrates who took part in the proceedings, stated that no division whatever took place on the first day, all the magistrates but two or three being of opinion that the appeal should be proceeded with, and the chairman saying it was useless to divide, because they were all one way. These affidavits contained no other material statement of fact. They denied generally that deponents had acted partially or corruptly, or that any interested magistrates had taken part in the proceedings.

Sir *J. Campbell* and *W. J. Alexander* now shewed cause. [Lord *Denman* C. J. It will be better to consider first whether the certiorari clause (section 136) in this act extends

to prevent our interference in a case of malversation.] That section is in the following terms: "And be it further enacted, that no order, verdict, rate, assessment, judgment, conviction, or other proceeding, touching or concerning any offence against this act, or any bye-law or order in pursuance thereof, shall be quashed or vacated for want of form only, or be removed or removable by *certiorari*, or any other writ or proceeding whatsoever, into any of his Majesty's Courts of Record at Westminster, any law or statute to the contrary thereof in anywise notwithstanding."

This Court has often repudiated the jurisdiction to sit as a court of error from the quarter sessions, even in cases where *certiorari* has not been taken away: *Rex v. Justices of Monmouthshire* (a). So in a later case of the same name (b), which is immediately applicable, because the *certiorari* was moved for in that case on the ground that one of the justices, who voted in favour of the respondent parish, on appeal against an order of removal, was interested as being a rated inhabitant of that parish, the Court discharged the rule for a *certiorari*, though the *Case of Foxham Tithing* (c), *The Parish of Great Charte v. Kennington* (d), *Rex v. The Inhabitants of Yarpole* (e), and *Rex v. Gudridge* (f), were cited to shew that the interference of interested magistrates had entirely denuded the inferior Court of its jurisdiction. The Cheltenham Paving Act employs the most stringent terms in taking away the *certiorari*, and the late cases of *Reg. v. Bristol and Exeter Railway Company* (g), *Reg. v. Sheffield and Manchester Railway Company* (h), *Rex v. The Justices of the West Riding* (i), are strong instances to shew the disposition of this Court to respect the *certiorari* clause, even where the proceedings

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| (a) 4 B. & C. 844; S. C. 7 D. & R. 334. | (f) 5 B. & C. 459; S. C. 8 D. & R. 217. |
| (b) 8 B. & C. 137; S. C. 2 M. & R. 172. | (g) 1 P. & D. 170, n. |
| (c) 2 Salk. 607. | (h) 3 P. & D. 111. |
| (d) 2 Str. 1173. | (i) 1 A. & E. 563; S. C. 3 N. & M. 802. |
| (e) 4 T. R. 71. | |

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in question have been in direct contravention of the statute, and have led to manifest injustice. *Lord Oakley v. Kensington Canal Company* (a), and *Norris v. Smith* (b), may be cited also to shew generally that any act done nominally in pursuance of a statute, even though, as in the former of the two cases, it be done with bad faith, may be within the protection of a statute, as to notice or to limitation of action. [Lord Denman C. J. Do the certiorari clauses apply where the inferior Court is not properly constituted?] In *Reg. v. Sheffield and Manchester Railway Company* (c), already cited, the sheriff's deputy was no more than a stranger.

But it can never be taken as a general rule of law that any infinitesimal amount of interest in any one member of a Court will vitiate its proceedings. Would a judge of this Court be incompetent to take part in a case affecting the East India Company or the Bank of England, because he held stock in either of those companies? In *Rex v. The Justices of Monmouthshire* (d), the interested vote affected the result of the trial, yet this Court did not, on that account, revise the judgment of the Court of Quarter Sessions. In the present case, the only magistrates who were personally assessed to the rate in question, took part in the proceedings of the first day only. But, it cannot be said that they did any judicial act; they retired with their fellow justices, but the Court was nearly unanimous, and the question was never put to the vote. But, even if the magistrates rated had actually voted and turned the scale by so voting, it is clear that this Court has no power to interfere.

Lord DENMAN C. J.—If a case of malversation is made out against the justices, the certiorari clause will not preclude our interference. We have no doubt that this Court has power to declare null and void the proceedings of any inferior Court which are brought about by malversation.

(a) 5 B. & Ad. 138.

(c) 3 P. & D. 111.

(b) 10 A. & E. 188; S. C. 2 P.
& D. 359.(d) 4 B. & C. 844; S. C. 7 D.
& R. 334.

The certiorari clause in a statute assumes that the order or judgment in question has been the act of the proper authority, lawfully constituted, and that cannot be the proper authority lawfully constituted which has been improperly brought together and packed from unworthy motives. If therefore the case is established which is set up on the other side, the certiorari clause will be no obstacle to our seeing that justice is done. On that point we need not hear any further argument. My brother *Williams* remembers a case in which Lord *Ellenborough* acted upon the same principle (a).

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Sir *W. W. Follett* (with whom were *Kelly* and *Rickards*) contrâ. The Court having decided that the statute taking away the certiorari will not prevent the interference of this Court, if a case of malversation be made out against the justices, it remains to shew that the conduct of some of the justices, who were parties to this order, amounted to malversation. It is a maxim of the common law that no man shall be judge in his own cause, and an express provision of the legislature (the 16 *Geo. 2*, c. 18) was necessary, to enable justices out of sessions "to make, do and execute all and every act or acts, &c. appertaining to their office as justice or justices of the peace, so far as the same relates to the law for the relief, maintenance and settlement of poor persons, for passing and punishing vagrants, for repair of the highways; or to any other laws concerning parochial taxes, levies or rates; notwithstanding any such justice or justices of the peace is or are rated to or chargeable with the taxes, levies or rates, within any such parish, township or place affected by any such act or acts of such justice or justices as aforesaid." The same statute, however, *ex abundanti cautela*, contained the following proviso (section 3), in confirmation of the common law in other respects: "That this act, or any thing therein contained, shall not authorize or empower any justice or justices of the peace, for any county or riding at large, to act in the determination

(a) See the judgment of *Williams J.*, *post*.

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of any appeal to the quarter sessions for any such county or riding, from any order, matter or thing relating to any such parish, township or place, where such justice or justices of the peace is or are so charged, taxed or chargeable as aforesaid; any thing herein contained to the contrary notwithstanding." It appears, in the present case, that on each of the three days of the trial there were some justices present who acted as judges in their own cause. On the first day there were five present, who were assessed by name to the rate appealed against. On all three days there were some justices present who were members of companies contributory to the rate; and on the second day, three justices, so interested, when the division was eleven to eight against the rate, actually turned the scale in their own cause. But this Court, in the exercise of its jurisdiction over inferior Courts, for the purpose of seeing that justice is duly administered by them, will not think it necessary to cast up the votes, like an election committee, and so inquire whether the judgment under review was really the act of a majority duly qualified. The judgment is the act of the whole Court, and that Court must be properly constituted; the question therefore is, whether a party had a right to sit as judge, not what he did as judge. Thus in *Rex v. Gudderidge* (a), where an interested magistrate had voted, *against* his interest, for the granting a case to this Court, and it was sought to uphold the proceedings of sessions on this ground, Abbott C. J. said, "We think the safer course is for us to say that magistrates should not interfere in any way, in cases where they are directly or indirectly interested." It appears from the *Case of Forham Tithing* (b), already mentioned, that, if a judge of one of the superior Courts were interested in a suit in his own Court, the very form of the placita would be altered. On the first day of this trial there was no actual division, but interested magistrates took part in the discussion, and it is impossible to say how far the influence of any one interested magistrate

(a) 8 D. & R. 217.

(b) 2 Salk. 607.

may have conduced to the decision. The verdict of a jury could not stand under such circumstances, and all confidence in the administration of justice will be destroyed, if it be held that it signifies not how active a part an interested member of a Court may take in discussing or otherwise dealing with a cause, provided he does not influence the result by his actual vote. [Lord Denman C.J. *Rex v. The Justices of Monmouthshire* (a) seems against your argument.] If that case decides what is contended for on the other side, it cannot be maintained; it would go to shew that a judgment would not be disturbed even if every magistrate present were interested. [Patteson J. The report of the case in 2 *Man. & R.* 172, as *Rex v. The Inhabitants of Uske*, is somewhat different from the other report.] It is difficult to understand the case, but the report of it, as *Rex v. The Inhabitants of Uske* would rather shew that Lord Tenterden C. J. never meant to say that this Court would not in any case disturb an order of sessions, where interested magistrates have taken part in the proceedings. The case is best explained by referring to *Rex v. The Inhabitants of Yarpole* (b), and it is clear, upon looking at the circumstances of the two cases, that all that this Court refused to do in either case, was to put itself in the place of sessions, and to pronounce the judgment which the sessions ought to have pronounced. In *Rex v. Yarpole* (b), eight magistrates at sessions were for confirming, and seven for quashing, an order of removal. It was objected that, as three of the eight were interested, they ought not to vote; but they did vote, and the order was confirmed, subject to the opinion of this Court, whether they had a right to vote or not. Both the original order of justices and that of sessions having been removed, a rule nisi was obtained for quashing both orders. "But Lord Kenyon C. J. said that could not be done, as no judgment for quashing the original order was entered on the rolls of the sessions. If the Court of

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(a) 8 B. & C. 137; S.C. 2 M. & R. 172. (b) 4 T. R. 71.

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sessions had *quashed*, instead of confirming the original order, there could have been no difficulty now. But the parties cannot come here *per saltum*; and, as no judgment for quashing the order of justices was given at the sessions, we, as a Court of error, cannot do *what the Court below should have done*. We must make that part of the rule absolute which has for its object the quashing of the order of sessions, and direct the justices below to enter a continuance, &c. when they may decide it." The application, therefore, was to quash *both* orders; but the order of removal had not been made by interested justices. This Court therefore had no ground for disturbing *immediately* the original order, and it could not do so *mediately* through the order of sessions, for, as the sessions had *confirmed* the original order, that order was not affected by setting aside the order of sessions, and this Court considered itself incompetent to go further, and pronounce the proper judgment for the sessions. But the order of sessions itself having been made by interested magistrates, was set aside. In *Rex v. The Justices of Monmouthshire* (a) also, where four justices at sessions were equally divided, and the case was adjourned, the application was to quash *both* the original order of removal and the order of sessions for the adjournment, on the ground that one of the four magistrates was interested in supporting the order of removal, and that if he had not been present the sessions would not have adjourned. The decision of the Court, as appears from the report in 2 *Man. & R.* 172, evidently was grounded on *Rex v. The Inhabitants of Yarpole* (b), and amounted to no more than this, that, with respect to the original order, this Court would not put itself in the place of the sessions and quash it, and that the sessions had jurisdiction to *adjourn*, which was the only thing they had done; and Lord *Tenterden* C. J. pointedly reprobated "a magistrate's voting in cases where he has a personal interest," as being a course

(a) 8 B. & C. 137; S. C. 2 M. & R. 172.

(b) 4 T. R. 71.

"not consistent with the due administration of justice" (a).
(He was then stopped.)

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LORD DENMAN C.J.—We have already decided that the certiorari clause does not take away the power of this Court to superintend and control the proceedings of inferior Courts, where they are not properly constituted. If a Court is not properly constituted it is not competent to proceed a step, and we need not enter into the consideration of how the members composing the Court polled, or of what was the question before it.

In this case it is clear that the course taken by the sessions on the second day cannot be supported. On that day three justices took an active part, who were interested in the question before them. That is a sufficient reason for saying that no order emanating from a Court of which they were members can stand. I find they took part in the proceedings, that is enough. I will not inquire what part. As much censure has been cast upon the magistrates in this case, I will take this opportunity of saying that I should be most unwilling to adopt the view that is suggested of their conduct by these affidavits—before doing so, I should wish for the verdict of a jury. In deciding this case I do not mean to say there may not be cases where a magistrate who is interested may be present without vitiating the proceedings. If his interest were very slight, and at the same time notorious, and not objected to, or, at all events, if any thing took place which could be construed into consent, it would be monstrous to say that his presence would vitiate all the proceedings. Great inconvenience, especially in borough sessions, might arise from our laying down such a rule. It would perhaps be well if an interested magistrate were always to declare the

(a) Another point was discussed, whether under the particular circumstances of this case, which are

not material to report, the act allowed the appeal to the quarter sessions.

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ground of objection to which he might be obnoxious on the score of interest, and then the parties might waive their objection. Here there is no pretence for supposing that the respondents consented that the interested magistrates should take part. Our only difficulty in this case has arisen from the case of *Rex v. The Justices of Monmouthshire* (a). But it is difficult to reconcile what Lord *Tenterden* is there reported to have said, with his known habits of thought; and the other report of the same case by the name of *Rex v. The Inhabitants of Uske* (b), shews that he did not intend to lay down any thing at all inconsistent with our present judgment. We cannot suppose he wished to sanction in any way the principle that proceedings taken at sessions by magistrates interested in the question before them were exempt from revision by this Court.

PATTESON J.—I doubted for some time whether that which took place on the first day would justify us in making this rule absolute. But, without going into that, I entirely agree with my lord that what took place on the second day is quite enough to vitiate the proceedings on that day; three out of the eleven magistrates on one side were interested, and, if these three were struck off, it would destroy the majority. At the same time I am not prepared to say that, if one interested magistrate had voted with fifty others who were not interested, it would vitiate the proceedings. It may be so, but it is not necessary to lay that down, and I can conceive that great injustice might be done by laying that down; for a magistrate interested on the ground of his being a member of some joint stock company might never once think of that circumstance, and then the party who failed might fish out the objection, to the defeat of justice. In this very case the three magistrates who voted on the second day might never have thought of their connection with the different companies as giving them any interest. Though I do not give any opinion on what took place the first day,

(a) 8 B. & C. 137.

(b) 2 Man. & R. 172.

I may say I was surprised to hear the mere circumstance relied on of the interested magistrates not actually voting.

Many attempts have been made lately to get rid of the certiorari clause in acts of parliament, on the ground that the inferior Court has acted without jurisdiction. Such attempts I think ought to be carefully watched, and I will confine myself on this occasion to saying that it is on the special ground of malversation that I decide.

The affidavits, in support of this rule, are very voluminous, and a good deal that is stated in them is hearsay, and is contradicted. I think it right to say that in making this rule absolute I do not mean to say that any of the magistrates were partial or corrupt, or knew they were doing any thing wrong.

WILLIAMS J.—I also decide with reference to the proceedings of the second day. I agree, that, if interested magistrates are present, and the contending parties look on, so as in any way to imply a desire that the Court so constituted should proceed, the proceedings of the Court should not be disturbed. But, with profound respect for the doubt which my brother *Patteson* has just expressed on the subject, I may be permitted to say that I entertain a strong impression (a good deal strengthened by the statute Sir *W. Follett* referred to) that, speaking generally, the circumstance of a Court being improperly constituted would vitiate its proceedings. The case which I mentioned to my lord was, as Mr. *Robinson* informs me, *Reg. v. Rishton*, decided in 1813. The application there was not opposed certainly, but still it is a *prima facie* case applicable to the present to shew that this Court will interfere with the proceedings of an inferior Court which has been ill constituted.

WIGHTMAN J. concurred.

Rule absolute.

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Pauper applied to take a tenement. The owner refused to let unless another person would become joint-tenant with him. On this the two became joint-tenants, at 17*l.* a year. Pauper entered upon and occupied the tenement exclusively, and paid all the rent for some years:—Held, the demise being to him and another, and the rent only 17*l.* a year, that he had not gained a settlement under 13 & 14 Car. 2, c. 12.

The QUEEN *v.* The Inhabitants of ABERDARON.

ON appeal against an order for the removal of a pauper to the parish of Aberdaron, the quarter sessions for the county of Carnarvon confirmed the order, subject to the opinion of this Court, upon the question whether *Owen Jones*, the husband of the pauper, gained a settlement in the parish of Llanistymdwy, under the following circumstances:

In 1809, the pauper's husband applied to become tenant, to one *T. P. Jones, Esq.*, of a certain dwelling-house and premises in Llanistymdwy. The agent of the said *T. P. Jones* refused to let to the pauper's husband, unless his father-in-law became joint-tenant with him, and the tenement was accordingly let to the pauper's husband and his father-in-law, as joint-tenants, at the yearly rent of 17*l.* 17*s.*, and thereupon or shortly afterwards the pauper's husband alone entered into the occupation of the tenement, and continued in such sole occupation thereof for five years, without any benefit to or interference by his father-in-law, who resided twenty miles therefrom. The pauper's husband alone, from time to time, paid the whole of the rent for the first four years of the said period, and 15*l.* on account of the fifth year thereof, and his father-in-law did not pay any part of the rent, though his name was also inserted as joint-tenant in each of the receipts.

It was contended, on behalf of the appellant parish, that there was a "coming to settle" by the pauper's husband upon the tenement, and that consequently a settlement was gained in Llanistymdwy; but the sessions considered that, as the pauper's father-in-law was joint-tenant, and jointly liable with him for the rent of 17*l.* 17*s.* (though the occupancy was by the pauper's husband alone, and the rent paid by him), no such settlement was gained.

Greaves, in support of the order of sessions. This was a

joint taking by two persons of a tenement under the value of 20*l.*, and therefore would give a settlement to neither: *Rex v. Great Waking* (a). (He was then stopped.)

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Jervis contrà. It was not until 59 *Geo.* 3, c. 50, that either hiring or payment of rent was necessary to this species of settlement. The present case is under 13 & 14 *Car.* 2, c. 12, and the pauper "came to settle" upon a tenement of 10*l.* value, within the meaning of that statute. It was not necessary that there should have been any contract whatever, and the circumstance of there being a contract was never material, except to shew that the pauper occupied independently, and not as servant: 2 *Nol. P. C.* 1 (b), *Rex v. Fillongley* (c) *Rex v. Netherseal* (d), *Rex v. Lakenheath* (e), *Rex v. Chediston* (f), *Rex v. Helsham* (g), (in both which last cases *Rex v. St. Michael, in Coventry* (h), was cited contrà,) *Rex v. St. Mary, Newington* (i). But, in point of fact, the taking in this case was not by the two persons; the pauper's husband was really the sole tenant as well as the sole occupier; his father-in-law was a mere nominal joint-tenant, by way of surety, which is immaterial: *Rex v. Butley* (k), and *Rex v. Hooe* (l). Even if the taking was by both, his father-in-law might have underlet the whole to the pauper's husband.

Greaves. In *Rex v. Great Waking* (a) there was some evidence of such underletting, for the receipts shewed that the rent was paid by the pauper only. Here there is no such evidence, and the Court will not presume an underletting. Although no renting was necessary under 13 & 14

(a) 5 B. & Ad. 971; S. C. 3 N. & M. 47.

(b) 4th ed.

(c) 1 T. R. 458.

(d) 4 T. R. 258.

(e) 1 B. & C. 531; S. C. 2 D. & R. 816.

(f) 4 B. & C. 230; S. C. 2 D. & R. 269.

(g) 2 B. & Ad. 620.

(h) 15 East, 567.

(i) 5 B. & Ad. 540; S. C. 2 N. & M. 357.

(k) 1 Burr. S. C. 107.

(l) 4 East, 362.

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Car. 2, yet the cases shew that, where there is a *joint* renting, no settlement is gained by any one joint-tenant, unless the value of the tenement divided by the number of tenants will give 10*l.* for each of them: *Croft v. Gainsford* (a), *Marden v. Barham* (b).

Lord DENMAN C. J.—If we followed exactly the words of 13 & 14 *Car. 2*, c. 12, we should be led very far from the decisions. It is found indeed that the tenement was occupied by the pauper's husband solely, but that it was not let to him solely. It might afterwards have been underlet to him by his father-in-law, but that is not found, and, upon the case stated, his father-in-law might have come in at any time and have occupied with him. According to the decisions, and particularly *Rex v. Hooe* (c), we are bound to say that no settlement was gained.

PATTESON and WILLIAMS Js. concurred.

D.

Order of Sessions confirmed (d).

(a) 2 Bott, P. L. 194 (6th ed.).

(c) 4 East, 362.

(b) 2 Bott, P. L. 197 (6th ed.);

(d) *Wightman J.* was absent.

S. C. 1 Burr. S. C. 311.

Monday,
 May 10th.

DOE d. ROSE RIDDELL v. GWINNELL.

By the custom
 of the manor of
 Cheltenham,
 as settled by

THIS was an action of ejectment, tried at the spring assizes for the county of Gloucester, in 1836, before *Alder-*
1 Car. 1, the widow of a copyholder is entitled to dower out of all the customary lands of which her husband was tenant during the coverture, although he did not die tenant, such lands having been aliened during the coverture by the husband alone, without the wife having been examined in Court, or having joined in the surrender.

Where such lands, between the time of alienation by the husband and of his death, have been improved in value by buildings, the widow is entitled to dower, according to their value at the time of his death, although one-third remain not built upon. And if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each such possessor.

son B., when the jury found a verdict for the plaintiff, subject to the opinion of this Court upon a special case, with liberty for either of the parties to turn it into a special verdict, if they should think proper.

The case was stated at very great length, but the material facts are sufficiently noticed in the judgment of the Court.

A private act of 1 *Car.* 1, c. 1(a), the customs of the manor before the act passed, and the court rolls, were to be considered as part of the case.

The case was argued (b) in Michaelmas term, 1839, by *R. V. Richards* for the lessor of the plaintiff, and Sir *W. W. Fullett* for the defendant, who submitted to the Court that the decision in *Riddell v. Jenner* (c) ought to be reviewed.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—The first question in this case, viz. whether there was sufficient proof of marriage, was conceded, on the argument, to be in favour of the lessor of the plaintiff.

The second question is, whether the widow, according to the customs of the manor of Cheltenham, as settled by stat. 1 *Car.* 1, was entitled to her dower or freebench as to all the copyhold lands of which her husband was seised during the coverture, or only as to those of which he died seised. Prior to that statute she was entitled only as to

(a) "An Act for settling and confirmation of copyhold estates and customs of tenants in base tenure of the manor of Cheltenham, in the county of Gloucester, and of the manor of Ashley, otherwise called Charleton Kings, in the said county, being holden of the said manor of Cheltenham, according to an agreement thereof made between the king's most excellent majesty, being then Prince of

Wales, Duke of Cornwall and of York, and Earl of Chester, Lord of the said manor of Cheltenham, and Gyles Greville, Esq., Lord of the said manor of Ashley, and the said copyholders of the said several manors."

(b) Nov. 16 and 19, before Lord Denman C. J., *Patteson, Williams and Coleridge* Js.

(c) 10 Bing. 29; *S. C.* 3 M. & Scott, 673.

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those of which he died seised; but she had the whole of them for her life, and twelve years after, if she disposed of them, or, if she married again, her second husband had them. The descent also of copyhold lands was to the youngest son.

By the statute of *Car. 1*, the descent was directed from thenceforth to be in fee simple, according to the rules of the common law, except that the eldest daughter should take, instead of all the daughters.

This alteration of the descent is important only because an argument was raised, that, as the estate was to descend as at common law, it must descend with all the common law incidents, and dower as one of them.

Whether such a consequence would follow or not, in the absence of any express provision by the statute itself, in regard to dower or freebench, is not material, as we are of opinion that the statute has such express provision. Section 5 enables copyholders to assign to their wives for life any part of their messuage and lands for their jointure; and the latter part of section 8 provides that wives, who before marriage accept of such jointure of their husband's customary lands, or after marriage accept, and after the death of the husband, agree to such jointure, shall be barred to demand any dower of those or any other customary lands of their husbands. Section 8, in the early part, enacts that the wives shall from thenceforth have for dower, during their lives, the third part only of their husbands' customary lands, and the said third part to be set forth and assigned to them by the homage of the Court, wherein the presentment of the death of the husband shall be presented, or within such time next after the same Court as shall be limited by the stewards. It then provides that women, theretofore wives of copyholders *dying tenants*, and wives of these copyholders, might enjoy the customary lands of their then or late husbands *dying tenants*, under the old custom. This section, in the enacting parts, has no words of confining its operation to lands of copyholders *dying*

*tenants*, or lands of which they died seised,—but in the proviso for preservation of the old rights it has,—thereby making a marked distinction, and when it is considered that the widow's right was reduced from the whole for her life, and twelve years after, to one-third for her life, the distinction can hardly have been unintentional.

But the statute does not rest there, for by section 9, wives of copyholders, which shall join in any grant or surrender with their husbands of any of the customary *messuages* or lands, being first solely and secretly examined in Court, according to the custom there, shall be concluded and barred afterwards to claim any right, title or estate whatsoever of or in those lands so by them surrendered and granted as aforesaid.

If this section applies to *all* the husband's copyholds it is conclusive of the question, because it shews that the wife, during her husband's life, has an interest in all the copyholds, which she may bar or refuse to bar by conveyance, after being solely examined. Whereas, if she is entitled only to an interest in such lands as her husband dies seised of, the section would be entirely useless and absurd, her conveyance would be wholly immaterial, and her husband might convey away without her consent, and so she would be barred, whether she joined or not.

The learned counsel for the defendant felt this, and therefore insisted that the 9th section must be referred to the 5th, and applied not to all the husband's copyholds, but only to cases where copyholds have been assigned to a wife for *jointure*, and observed, upon the introduction of the word *messuages* in this 9th section, which is found in the beginning of the 5th section, but not throughout the 8th. Yet the latter part of the 8th section plainly relates to the same subject-matter as the 5th, for it declares the consequence of wives accepting the jointure which the 5th section enables the husbands to make; it follows that the word *lands*, in the latter part of the 8th section, must be as extensive as the words *messuages and lands* in the 5th. In truth

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the criticism is much too minute, and we cannot think that the introduction of the word "*messuages*," in the 5th and 9th sections, sufficiently indicates an intention, on the part of the legislature, to confine the operation of the 9th section to the cases mentioned in the 5th, and are of opinion that it applies to all the copyholds of the husband, and for the reasons above stated is conclusive upon this question.

An objection was made that the third part is to be set forth by the homage, and it was asked how can the homage present the death of a person who did not die tenant? We see no objection to their presenting the death of any person, whether tenant or not, upon whose life any copyhold estate may depend, or by whose death any copyhold estate may be affected, or any new estate arise. We do not rely on the use of the word "*dower*" in the statute, as importing that the wife should take dower as of a freehold estate; but, by an examination of the whole scope and language of the statute, have come to the conclusion that the wife is entitled to one-third of all the copyholds of which her husband was seised during the coverture for her life, as her dower or freebench; and we are fortified in this conclusion by the decision of the Court of Common Pleas in *Riddell v. Jenner* (a), being upon this very point.

The third question is, whether the widow shall have a third part of the lands according to their value at the time when her husband aliened them, or at the time of his death, or at the time of the assignment. In the present case, the value at the time of the death and at the time of the assignment, though some years elapsed between them, seems to have been the same.

The question is between the value of the lands at the time of alienation and of the death of the husband. It appears that the lands have been greatly improved by building, but that one-third at least of the lands, aliened by the husband, remained not built on. That part, however, is not in the hands of the defendant, for though the husband aliened to one person, that person parcelled out the lands

(a) 10 Bing. 29; S. C. 3 M. & Scott, 673.

to several others. We are of opinion that where the lands at the death of the husband are in possession of several persons, whether by his the husband's act, or the act of his alienee, dower must be assigned as to one-third of the lands in each person's possession, and, therefore, that the question above stated is raised in this case, notwithstanding the quantity of land still remaining not built on.

Very little is to be found in our books upon this question. What authorities are found are collected by Mr. *Park* in his valuable Treatise on Dower, p. 255, *et seq.* The principal authority is *Perkins* (a), sect. 328, who lays it down, "that if the feoffee build thereupon a castle or a mansion house, or other buildings, or otherwise doth improve it, so that it is worth more by the year than when it was in the possession of the husband, the wife shall not have dower but according to the value it was at the time of the husband; and yet, if a disseisor build upon land which he hath by disseisin, and the disseisee enter, he shall have the building, &c., the difference is apparent." The very next section of *Perkins*, viz. 329, lays down that, if the feoffee "takes down the building, and the feoffor dieth, the wife shall have dower according to the value of the land as it was at the time of the death of the husband, and hath no remedy for the taking away of the building before the death of the husband, notwithstanding that the building was upon the same land in the possession of the husband during the coverture; for the wife hath not right to have dower before the death of the husband. Tamen quære of this case." The two sections are certainly not very consistent. The wife's right to dower is doubtless not consummate until the death of her husband, and, if that be a good reason why she must submit to the intermediate deterioration of the property, it is also a good reason that she should have the advantage of the intermediate improvement of it. If the alienee be considered as in the place of the husband in regard to the land, and to have the same rights that he had,

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there cannot be a doubt but that the time when the value is to be ascertained must be the death of the husband, and, if the alienee suffers, it is his own fault for improving land on which he must have known that the wife's right would attach if she survived her husband. So the reason for the doctrine of the 328th section, given in a note to *Co. Lit.* 32 a, from Lord *Hale's MSS.*, applies equally to the 329th. "For the heir is not bound to warrant except according to the value as it was at the time of the feoffment, and so the wife would recover more against the feoffee than he would recover in value, which is not reasonable." Mr. *Park* refers to the Book of Assizes (14 Ass. 12) as a judgment for the widow, *salvis ædificiis*, and says, "It is added, with some inconsistency, 'and no damage, because the land was amended by building upon it.'" On examination of the original authorities, it will appear that here some confusion has taken place, and two cases have been reported as one. For the former of them is not in the Book of Assizes, but in *Fitz. Abr. Dower*, pl. 192: To a writ of dower against *W.*, he pleaded "*quod emit terram illam de viro suo nudam et in-ædificatam et super ædificavit et libenter concedit ei tertiam partem suam salvis ei ædificiis. Et ideo ipsa habeat seisinam suam salvis eidem W. domibus suis ædificatis, &c., quod habet alibi extra ædificia ubi habere poterit terram suam.*" But the latter part of the sentence stated by Mr. *Park*, respecting damages, is in 14 Assizes, 12, and is the case of a prior, who recovered by default in an assize of novel disseisin—"Et l'assize dicunt que a nul damage, &c. car la place est amendé per edifier,"—a decision wholly foreign to the present subject. *Plowden's* 46th quære is in these terms: "A woman is entitled to have dower of a marsh; the heir, by his industry, makes it good meadow; she recovers it, and shall be endowed of the third part as it now is, because her title is to the *quantity* of land, not to the *value*; but, if the heir *improves the land by building*, or the like collateral improvement, it shall be otherwise. *Quære*, if the heir suffers the houses upon the land to decay, shall

the wife be endowed of the land according to its value, when it was in the possession of her husband, or shall she have the third part as it now is, and be allowed in damages for the impairing? And it seems that damages shall not be recouped in assize for the improvement of such marsh." Then follows the passage from *Co. Lit.* 32 a, with the note from *Hale's MSS.*, already referred to. Hitherto, all these authorities, we think, admit of a general answer, from considering the nature of dower and the remedy provided for it by the law of England. The right unquestionably attaches on all the lands of which the husband was seised during the coverture, and as certainly attaches at the period of his death. If, indeed, the assignment of dower be postponed, the value must be taken at the period of assignment, and, as the sheriff, in case of any dispute, is the appointed judge for dividing the land by metes and bounds, it is difficult to see how that duty can be performed *at any other time*. But we must examine the authorities more in detail. On that of *Perkins* we have already pointed out its obvious inconsistency. We may add that he supports his proposition by no authority, and shews his own doubt of its correctness by the quære which he subjoins.

But his 328th section derives countenance from *Hale's MSS.* cited in *Mr. Hargrave's* note. The reason there stated cannot, however, be a just one, if the wife is properly considered as an entire stranger to all dealings between the husband and his feoffee. It also appears to prove too much, for it would extend to all manner of improvements as well as building. The case in *Fitz. Abr.* is open to two constructions—either that the law would compel the widow to accept her dower out of the uncovered land, where a sufficient portion was left in that state, or that in the particular instance an amicable arrangement was made, and the purchaser was therefore permitted to have the full benefit of his own improvements, from a view of what was then considered expedient and equitable. The latter appears the more probable supposition, and considerations of that sort would probably at all times influence those whom the law

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trusted to make the assignment. The estimate of value awarding a part of the estate to the widow could hardly fail to be perplexed by the existence of buildings on the land, whether erected of old time or since the husband's death. The widow was not to be endowed of a castle, if for the defence of the realm, because that seems to have been rather regarded as public than private property; nor was she to be endowed of the mansion house or capital messuage, if that was *caput baroniæ vel comitatûs*, the meaning of which words underwent much discussion in the *Lady Gerard's* case (*a*); but, even if it were *caput baroniæ*, we have it laid down by as old an authority as *Bracton*, b. 2, fol. 97 *b*, that she must have her dower, even of a house so denominated, if no other dwelling can be found for her, *ut habeat ubi caput reclinet*. If, on the other hand, it is meant that the edifices raised by an alienee can never be assigned to the widow, she must then of necessity be endowed by means of a money payment, if the whole land happened to be built upon. This state of things, never thought of in ancient times, may commonly occur now. But, how is the estimate to be made? If, according to the present value, the alienee gains nothing by the sale; if, according to any former value, when is it to be assumed,—at the period of alienation or of the husband's possession before—and how will it be possible for such an inquiry to be brought to a satisfactory termination? *Plowden's* quære, and his own opinion upon it, as well as *Lord Coke's*, appear to be in the widow's favour; but it is introduced by a reason which would apply, and to her prejudice, in a case like the present. But then *Lord Coke's* authority is against him, and he founds himself on no other reason than that improvement by building is collateral to the land. But why collateral? It occupies and obliterates the land, and makes an assignment of it impossible, and destroys the very means of ascertaining its independent value. The effect of planting with timber or sowing with corn, or indeed of improving by any expensive process, is much the same, ex-

(*a*) 1 *Ld. Raym.* 72.

cept perhaps for this last circumstance; but we cannot see any reason for calling them less collateral than building. These text writers indeed speak of the heir, not of an alienee, and it is truly observed that an heir voluntarily lays out his money on that which he not merely knows to be subject to the rights of another, but which at the very time ought to have been assigned to and possessed by another. But the same observation, in part, applies to a purchaser, who must be presumed to know the title of his vendor and the liabilities of the estate purchased. *Perkins's* distinction between a feoffee and a disseisee rests on no authority, nor do we see how the rights of all the dowress are to be affected by it. She knows nothing of the title under which it is held, and indeed questions of the most difficult nature might arise, whether the party in possession is a wrongful disseisor or a feoffee with a good title. Must these be decided by the sheriff before she can enjoy the provision made for her by the law?

The sheriff's duty in assigning dower may be extremely arduous, if he is only to determine on a fair distribution according to the value of the property, varying as it may through all the difficult portions of a large estate; but it would become impracticable if he had to examine into the evidence of alienation, and the legal effect and consequences of it, or if he was bound to assign not according to the state of things then existing, but with reference to matters as they may be shewn to have existed in the lifetime of the husband, peradventure many years before. By these considerations we are led to conclude that dower attaches on the husband's real property at the period of his death, according to its then actual value, without regard to the hand which brought it into the condition in which it is found, the law apparently presuming that it will continue substantially the same up to the assignment. Mr. *Park* informs us that the understanding of the profession is, that the wife shall be endowed of the land as she finds it at the time of her title to dower consummated. We have permission from Sir *Edward Sugden* to state that he always

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considered the rule to be that the widow is entitled to have assigned to her as her dower so much in value as is equal to a third in value, according to the condition of the estate at the time of her husband's death. This opinion, contradicted by no judicial authority, is an important evidence of the law on a subject very unlikely to be brought into Court in hostile controversy, but almost always certain to be arranged by the advice of eminent conveyancers, regulated in some respects by domestic circumstances, but surely not without some reference to the general principles of law handed down through a succession of ages.

Ulterior questions were discussed at large, and might appear to call for particular consideration, if they were not in fact disposed of by what we have already laid down :—  
 1st. That the assignment of dower is naught, because by the custom the husband's death ought to be presented at the next homage, and the dower then assigned by them. But we must consider the homage as placed by the custom in the office of the sheriff at common law, and we have already seen that, though the right to dower attaches on the event of the husband's death, the assignment may be delayed even long enough to allow the heir time to erect buildings on the land. There ought indeed to be a reasonable degree of promptitude in preferring all claims, but we should not be justified in saying that delay was alone a sufficient proof of the claimant being wrong in any sense of the word, because it may have been caused by ignorance of facts, by the conduct of the opposite party, or even by negligence in those who have the duty to perform. In the present instance the special case reminds us that there was a necessity for issuing a writ of mandamus to the homage to compel the assignment. 2nd. Some of these buildings were erected long after the death of the husband, not even by the purchaser from him, but by various sub-purchasers. But this cannot prevent Lord Coke's rule from applying, and the hardship is voluntarily incurred by those who ought to have informed themselves correctly of the title which they took. 3rd. Some objection was taken to the mode

of assigning dower in two respects, both by awarding a third part of the property of each separate owner, and by dividing the several houses into chambers, a third of which are to be allotted to the plaintiff as dower. On both points the authority of *Co. Lit.* is in the plaintiff's favour. Indeed the former objection ought rather to come from her, for that arises from a division which may be injurious to her, and which her paramount right might be thought to dispense with, but ensures perfect justice to all the purchasers. Lord *Coke* asserts that it is the proper course. As to the latter objection against the partition of houses, it is removed by the same high authority.

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Possibly all the objections that have been made may be answered by the nature of the proceeding which has occurred in the performance of a duty imposed by law on the homage, and has not been questioned by any competent jurisdiction. But, thinking what has been done right in its details as well as on the general principle, we have thought ourselves bound to act on that opinion, and direct that the verdict be entered for the plaintiff.

Judgment for the plaintiff.

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The QUEEN *v.* The Inhabitants of LYDEARD ST.  
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ON appeal to the Somersetshire sessions against an order for the removal of *Elizabeth Winter* and *Emma* her child,

A pauper's statement of what he has heard and believes as to the place of

(*a*) Decided (June 14) at the sittings in banc, after Trin. T. 1841.

his birth is within the rule excluding hearsay evidence, and insufficient to support an order for his removal.

Where the pauper, who gave such hearsay evidence as to the place of his birth, was stated in the examination to be in gaol for felony, and it was made as a ground of appeal, against the order for his removal, that it was not proved upon the oath of any *credible* witness where or when he was born:—Held, that the notice sufficiently pointed to the objection that the evidence itself was hearsay, and was not to be taken as a mere objection to the competency of the witness.

An examination stating "I was bound apprentice with *J. H.* of &c. but it was agreed in the indenture that I should serve the last forty days of my apprenticeship in *L.* and I served the last forty days in *L.* with *A. H.*"—Held insufficient, as a ground of removal under 4 & 5 *Will.* 4, c. 76, because it was not stated that the original master assented to the service with *A. H.*

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from the parish of Spaxton in the county of Somerset, to the parish of Lydeard St. Lawrence in the same county, as the place of the last legal settlement of *William Winter*, the husband of the said *Elizabeth*, the sessions confirmed the order subject to the opinion of this Court upon the following case:—

The examinations of *William Winter* the younger, the husband of the pauper, and *William Winter*, the father of the pauper's husband, upon which the order of removal was made, were as follows:—

"The examination of *William Winter*, now confined in Wilton gaol in the said county for felony, taken on oath before me, one of her Majesty's justices of the peace acting in and for the said county, this 15th day of July, 1840, who saith, that I am now about twenty-five years old; I was born in the parish of Lydeard St. Lawrence, as *I have heard and believe*; I have done no act whereby to gain a legal settlement on my own account; about January last I was removed by an order of removal from the parish of North Cadbury in the said county to the parish of Lydeard St. Lawrence in the said county, the last legal place of settlement of my father *William Winter*, as *I have heard and believe*; I have a wife named *Elizabeth*, and one child named *Emma*, aged about three years and a half.

Sworn before me, *F. Warre*.

*William Winter.*"

The above examination was duly certified by the magistrate.

"The examination of *William Winter*, now residing in the parish of Bagborough in the said county, shoemaker, taken on oath before us, two of her Majesty's justices of the peace acting in and for the said county, this 30th day of July, 1840, as to the settlement of his son, *William Winter*, who saith as follows:—My son *William Winter* hath not, to the best of my knowledge and belief, gained any legal place of settlement on his own account; my parents were legally settled, as *I have heard and believe*, in the parish of Lydeard St. Lawrence; I was born in the parish of Lydeard St. Lawrence, as *I have heard and believe*; I was bound apprentice by indenture with *John Hurley* of Fitzhead, shoemaker, but it was agreed in the indenture of apprenticeship that I should serve the last forty days of my apprenticeship in the parish of Lydeard St. Lawrence, and I served the last forty days of my apprenticeship in Lydeard St. Lawrence with *Aaron Hurley*, my master's father; I have had relief from the overseers of the parish of Lydeard St. Lawrence; my son *William Winter* was removed in January last by an order of removal from the parish of North Cadbury in the said county, to the parish of Lydeard St. Lawrence in the same county, as the last legal place of his settlement; I was examined before the

magistrates as to the legal place of settlement of my son, when the order of removal was made."

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The following are the grounds of appeal applicable to this part of the case:—

Because the said *William Winter* and the said *Elizabeth Winter* and their said child are not, and never were, legally settled in the said parish of Lydeard St. Lawrence, as set forth in the several and respective examinations of the said *William Winter* and *William Winter*, his father. Because it does not appear by either of the said examinations where or in what manner the said *Elizabeth Winter* and *Emma Winter* became legally settled in the said parish of Lydeard St. Lawrence. Because it is not true that the said *William Winter*, the father, was bound apprentice by indenture with *John Hurley* of Fitzhead, shoemaker, nor that he the said *William Winter* did serve the last forty days of his alleged apprenticeship in Lydeard St. Lawrence with *Aaron Hurley*, his master's father, under any indenture of apprenticeship, or with the consent of the said *John Hurley*. Because it does not appear in either of the said examinations that the said *William Winter*, the father, at any time served the said *Aaron Hurley* by the consent of the said *John Hurley*, or in any other manner, under any indenture of apprenticeship, nor when or by whom or for what time the said *William Winter*, the father, was bound apprentice by indenture with *John Hurley*, as in the said examination of the said *William Winter*, the father, is alleged, and which said *John Hurley* in the same examination is described as of Fitzhead, shoemaker, and there is no person of that name and description now, or at or about the date of the said order, residing at Fitzhead, nor any person of the name and description of *Aaron Hurley*, father of *John Hurley*, now, or at or about the date of the said order, residing in the said parish of Lydeard St. Lawrence, and the said examinations are too general, and are wanting in sufficient particularity in each of these last-mentioned respects. Because no examination, or any copy thereof, has ever been



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sent to the overseers of the said parish of Lydeard St. Lawrence, *proving or setting forth upon oath of any credible witness when or where the said William Winter, the son, was born, nor his age.*

The only examinations sent to the appellants were the examinations hereinbefore set forth. On the evidence produced on the trial of the appeal, the Court found that the father, *William Winter*, resided and served the last forty days of his apprenticeship in Lydeard St. Lawrence with *Aaron Hurley*, his master's father, with his master's consent, under a valid indenture of apprenticeship, bearing date the 6th of April, 1789, produced by the respondent parish from the custody of *William Winter*, the father. The Court also found that *William Winter*, the son, was born in Lydeard St. Lawrence.

The question for the opinion of the Court of Queen's Bench is, whether the respondents were at liberty to go into these grounds of removal, or either of them, under the above examinations. The appellants objected to any evidence being received on these points, but the Court received it, subject to the opinion of the Court of Queen's Bench. If that Court should be of opinion that the sessions were right in receiving the evidence, the order to be confirmed. If the Court of Queen's Bench should be of a contrary opinion, the order to be quashed.

*Moody and Fitzherbert* in support of the order of sessions. The first objection to the examinations is, that they do not shew that the pauper's father served the second master with the consent of the first master. But, although the assent to the service with the particular master named is not set forth with the precision required in special pleading, it sufficiently appears from the statement "it was agreed in the indenture of apprenticeship that I should serve the last forty days &c. in Lydeard St. Lawrence, and I served the last forty days &c. with *A. H.*" [*Coleridge J.* It is consistent with this statement, that the apprentice served

*A. H.* against the consent of the first master.] The examination is sufficiently precise as between contending parishes, it is not to be scanned with the same strictness as a conviction or an indictment. [Lord *Denman* C. J. I should never infer from the examination that it was part of the agreement that the apprentice should complete his time with the particular person named. *Coleridge* J. It is probable that the individual was never thought of originally, and that the assent to the service with him was an independent act subsequently.]

The other objection to the examination is, that it is not set forth upon the oath "of any *credible* witness" when and where the pauper was born. That objection was obviously made with reference to *Reg. v. Alternun* (a), and pointed specifically to the circumstance of the pauper, who stated his belief as to the place of his birth, being a convicted felon. The appellants therefore, on such a notice of objection, had no right at the sessions, and have no right now, to object to the evidence as being hearsay.

But, even if the appellants were to go into the objection, the statement of a party of what "he has heard and believes" as to his having been born in a particular place, is not hearsay evidence in the ordinary sense; the fact itself can never be certainly known to the party whose birth is the subject of inquiry, and early recollection is constantly admitted to prove the place of birth. In *Reg. v. Ecclesall Bierlow* (b) the evidence was certainly hearsay, and hearsay of the place of settlement generally, without alleging how the settlement was acquired, so that from its mere generality it was a hearsay of *nothing* for the purposes of notice under the Poor Law Amendment Act. But here the evidence, even if it be hearsay, is evidence of a specific birth settlement.

Even if *Reg. v. Ecclesall Bierlow* (b) applies, the inconvenience of requiring strict legal evidence in support of orders of removal does not appear to have been sufficiently considered. *Patteson* J. observed in that case, "If the

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(a) 10 A. &amp; E. 699; S. C. post.

(b) *Ante*, 160.

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case goes to the sessions, the sessions must have legal evidence; the witnesses must be produced at some time or another." But the sessions have means of compelling the production of evidence which removing magistrates have not, and it will be almost impossible to make a good order of removal on strict legal evidence, especially where the settlement is a question between remote parishes(*a*).

*Bere and Kinglake* contra were not heard.

Lord DENMAN C. J. — The first question is, whether the examination sufficiently states that the pauper's father served the second master with the consent of the first. I am of opinion that such consent is not properly stated, and that the objection, of which due notice has been given, must prevail.

The second question is to the sufficiency of the examination in setting forth the place of the pauper's birth place. It is said that the only objection made, and intended to be made, to the examination in this respect, is that, with reference to the pauper, who speaks as to his birth-place, being a felon convict, and so incompetent from infamy, the fact in question is not proved on *credible* testimony, and that the objection, therefore, to the evidence, as being in itself hearsay, comes by surprise upon the respondents. I think the word "credible" by no means confines the notice of objection to the competency of the pauper, and that the appellants were entitled to go into the objection, that the evidence as to the birth settlement is entirely hearsay. That objection also must prevail, and the nature of the fact to be proved does not make this an excepted case. Early recollection may be evidence of the place of birth, but early recollection is not the evidence set forth, but merely hearsay and belief. It is remarkable, too, that the father, who

(*a*) Another point was glanced at in argument, viz. whether it was necessary for the examination to give the date of the indenture of apprenticeship.

was before the magistrate, and who might have given strictly legal evidence of the fact, is not examined as to it. I do not think the inconvenience of requiring magistrates to make orders of removal on legal evidence will be so great as is suggested. They may summon within their jurisdiction, and with respect to witnesses out of their jurisdiction we will do our best to assist them. In the sense in which the sessions ask our opinion, I think they were not at liberty to go into the facts of this case.

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PATTESON J.—I am of the same opinion. The appellants have given sufficient notice of their objections, and the removing parish might have abandoned their order, and drawn up a proper order on better evidence. If they obstinately go to the sessions with a bad order they have no ground of complaint.

They knew the consent of the original master was necessary to make good the service with the second master, and they should have gone back and got the fact supplied, if it could be.

As to the other notice of objection, I had no notion that it referred to the pauper, being a convict; I took it to refer to the hearsay evidence, and think it a good notice.

The date of the indenture of apprenticeship is not given. I do not know that it must always be stated, but it is often a material fact, and in this case it might shew (though the fact is highly improbable) that the father was bound after the son's emancipation; I do not know why the date should be kept back. I think it is much better to be strict in these matters, and trust that we shall bring parties at last to some regularity in their proceedings.

WILLIAMS J.—As soon as it was decided that an order of removal is not to be made upon hearsay evidence, this case was disposed of. It is new to me that evidence of the place of birth is to be a case excepted from the rules of hearsay evidence.

1841. With regard to the other objection, assent to the second service is the very point in that part of the case, and should have been stated. I abide willingly by the rule in *Reg. v. Middleton Teasdale (a)*, and think that the act meant to require every particularity.

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COLERIDGE J.—I am of the same opinion. I understand the objection to the evidence and birth settlement to point to the circumstance that the evidence was entirely hearsay. It is said the magistrates may remove on hearsay evidence, because the examination is *ex parte*, and because they have no process for compelling the attendance of witnesses generally. But I think they must act on legal evidence, and, if the want of process causes inconvenience, it may be obviated by the legislature. I do not mean to say that the reception of hearsay evidence would vitiate an order of removal, if there was other legitimate evidence.

D.

Order of Sessions quashed.

(a) 3 P. &amp; D. 473.

Monday,  
May 10th.

The QUEEN v. The JUSTICES of the WEST RIDING of  
YORKSHIRE *ex parte* ACKROYD.

An appeal does not lie to the Court of Quarter Sessions against an allowance of the accounts of the surveyor of the highways by justices at special sessions, under 5 & 6 Will. 4, c. 50, s. 44.

SIR G. LEWIN in Michaelmas term last had obtained a rule calling on the justices of the West Riding of the county of York to shew cause why a writ of mandamus should not issue, commanding them to enter continuances and hear an appeal of *Cowling Ackroyd* against the allowance of the accounts of *Abram Bastow*, as late surveyor of the highways for the township of Great Horton, in the parish of Bradford, in the said riding, by two justices.

Nor will this Court grant a mandamus to the special sessions, after they have once adjudicated and passed the accounts, to require them to re-examine such accounts, although it appears that improper items have been passed, and the justices who passed them admit they did not investigate the case fully, believing that an appeal lay from them to the quarter sessions.

It appeared upon the affidavits that the appeal mentioned in the rule had been duly entered at the quarter sessions holden at Bradford, and, upon the appeal coming on for hearing, the Court of Quarter Sessions were of opinion that no appeal lay against the allowance of the accounts of the surveyor of the highways by the justices in special sessions. The rule to shew cause was obtained on the ground that such an appeal does lie to the quarter sessions, under the 105th section of the stat. 5 & 6 Will. 4, c. 50, intituled, An Act to consolidate and amend the Laws relating to Highways in England.

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*Wightman, Baines, and Pashley* shewed cause (a). The cases of *Rex v. Justices of the West Riding* (b), and *Rex v. Mitchell* (c) shew that no appeal lay under the stat. 13 Geo. 3, c. 78, the statute in force before the passing of the stat. 5 & 6 Will. 4, c. 50. A right of appeal cannot be implied, but ought to be given in express terms: *Reg. v. Stock* (d). The 105th section (e), which is the general ap-

(a) In Hil. T. last (Jan. 28) before Lord Denman C. J. *Littleddale, Patteson and Coleridge Js.*

(b) 5 T. R. 629.

(c) Id. 701.

(d) 8 A. & E. 405; S. C. 3 N. & P. 420.

(e) "That if any person shall think himself aggrieved by any rate made under or in pursuance of this act, or by any order, conviction, judgment, or determination made, or by any matter or thing done, by any justice or other person, in pursuance of this act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace to be held for the county, division, riding, or place wherein the cause of such complaint shall arise, such appellant

first giving, or causing to be given to the surveyor or surveyors, or to such justice or other person by whose act such person shall think himself aggrieved, notice in writing of his intention to bring such appeal, together with a statement in writing of the grounds of such appeal, within fourteen days after such rate shall have been made, or cause of complaint shall have arisen, and within four days after such notice entering into a recognizance before some justice, with two sufficient sureties conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded by the justices at such general or quarter sessions; and such justices, upon hearing and finally determining the matter of such appeal, shall and may, according to their discretion, award

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peal clause, gives an appeal only "where no particular method of relief has been appointed" by the act, and the 44th section (a) does appoint a particular method of relief, that

such costs to the party appealing or appealed against as they shall think proper; and their determination in or concerning the premises shall be conclusive and binding on all parties to all intents and purposes whatsoever: Provided nevertheless, that in case there shall not be time to give such notice and enter into such recognizance as aforesaid before the next sessions to be holden after the making of any rate or the cause of complaint shall have arisen, then and in every such case such appeal may be made to the next following sessions, and shall be then heard and determined: Provided also, that it shall not be lawful for the appellant to be heard in support of such appeal, unless such notice and statement shall have been so given as aforesaid, nor on the hearing of such appeal to go into evidence of any other grounds of appeal than those set forth in such statement as aforesaid."

(a) "That within fourteen days after the election or appointment of surveyor as herein directed, the accounts as aforesaid made in writing, and signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, of all monies received and disbursed by virtue of this act, ending on the day of the election or appointment of surveyor, shall be made up, balanced, and laid before the parishioners in vestry assembled, who may, if they think fit, order an abstract thereof to be printed and published; and within one calen-

dar month after the election or appointment of surveyor as herein directed the said accounts shall be signed by the surveyor, district surveyor, or assistant surveyor for the year preceding, and laid before the justices of the peace at a special sessions for the highways holden at the place nearest to the parish or district for which such surveyor shall have been appointed, and such justices are hereby authorized and required to examine him as to the truth of the said accounts, or of any charge contained therein: Provided always that if any person chargeable to the rate authorized to be made by this act has any complaint against such accounts, or the application of the monies received by the said surveyor, it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts as aforesaid, and the said justices are hereby required to hear such complaint, and, if they shall think fit, to examine such surveyor upon oath, and to make such order thereon as to them shall seem meet: Provided nevertheless, that the several surveyors appointed under the authority of the said act passed in the thirteenth year of the reign of his late majesty King George the Third shall produce such books and statement and pass their accounts before the justices at a special sessions for the highways to be holden within their respective divisions in the week next after that in which the twen-

of complaining before the justices in special session. That section also shews that grave inconvenience might arise from holding that an appeal lay, for the special sessions are empowered to examine the surveyor on oath, the quarter sessions have no such power, and might therefore reverse an order of the special sessions, merely because they had no means of getting the same evidence before them. *Grose J. (a)* has given the reason why the legislature has not authorized an appeal. "The clause which directs the settling of these accounts at the special sessions is founded on justice and wisdom, and was calculated to save an infinity of expense and trouble to the parishioners."

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*Starkie* and *Sir G. Lewin* contra. The words of the appeal clause are large enough to give an appeal from the special sessions, and if it be capable of that construction, it ought to receive it, as there are many reasons to shew that such must have been the intention of the legislature. Questions of difficulty both of fact and of law may arise, money may be laid out on roads said not to be within the boundaries of the parish, and on questions of difficulty in law it may be desirable to have the judgment of a higher tribunal, for obtaining which, if no appeal lies, there is no provision, for the special sessions cannot state a case for the opinion of this Court. The statutes on which the cases cited were decided had provisions very different from those of the present act. The stat. 13 *Geo. 3*, c. 78, s. 48, directed the surveyor to lay his accounts before a justice, and if such justice thought fit he might refer them to the special sessions, so that there was in truth under that statute an appeal. The steps under it were, the initiative with the single justice, appeal to the special session; the corre-

ty-fifth day of March shall be in the year of our Lord one thousand eight hundred and thirty-six, and pay the balances thereof to the surveyor to be chosen in pursuance of this act, in the same man-

ner as they would have done to the surveyors to have been appointed if this act had not been passed."

(a) 5 T. R. 633.



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sponding steps under the present act are, the initiative with the special sessions, appeal to the quarter sessions. *Rex v. The Justices of Somersetshire* (a) and *Rex v. The Justices of the North Riding* (b) shew clearly that under the former statute the special sessions had an appellate jurisdiction only.

*Cur. adv. vult.*

Lord DENMAN C. J. (on the last day of Hilary term) delivered the judgment of the Court. The question in this case is, whether an appeal lies to the Court of General or Quarter Sessions, under the 105th sect. of 5 & 6 Will. 4, c. 50, against the allowance of the accounts of the surveyor of highways by the special sessions, under the 44th sect. of the same act. It has been already determined in the case of *Rex v. The Justices of the West Riding of Yorkshire*, 5 T. R. 629, and *Rex v. Mitchell*, in the same volume, 701, (which is the same case) that no such appeal lay under the provisions of 13 Geo. 3, c. 70, ss. 48 and 80. Under that act, the accounts were first to be taken to one justice, who might either allow them or refer them to the special sessions; whereas under the present act they are to be laid before the special sessions in the first instance; but this difference is of no importance, for we find that case decided, not upon the ground that the special sessions was as it were a court of appeal, but principally on the ground that the provision made for the surveyor handing over the accounts, after they should have been settled and allowed by the special sessions, shewed that the legislature did not intend the general appeal clause to apply.

A similar provision is to be found in the 42d section of the present act, and affords the same reason against the appeal, in addition to which the 44th section of the present act expressly provides for an appeal by any rate payer to the special sessions, and gives the justices their power to examine the surveyor upon oath; but the 105th section

(a) 5 B. & C. 816; S. C. 6 D. & R. 469.

(b) 6 B. & C. 151; S. C. 9 D. & R. 204.

(the appeal clause) gives no such power. If therefore an appeal lay from the special to the general or quarter sessions, the decision of the former might be reversed by the latter, by reason of the necessary exclusion of that very testimony which the legislature has empowered the former to receive,—a consequence which we cannot suppose to have been contemplated.

The circumstance of a notice to the surveyor being required by the appeal clause presents no difficulty, because there are many provisions in the act respecting things to be done by the surveyor and justices, as to which an appeal will lie, and to which those words requiring notice to the surveyor will apply.

Adopting therefore the decision in 7 T. R., and applying the principle of it to the present case, we are of opinion that no appeal lies; and this rule must be discharged with costs.


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Rule discharged.

A rule was afterwards obtained, calling on the justices of the special sessions, who had adjudicated upon this case, to shew cause why a mandamus should not issue, commanding them to review their decision.

The rule was obtained on the affidavit of *Ackroyd*, who deposed that, at the special sessions before mentioned, the deponent, as a person chargeable to the highway rates, objected to various items in the accounts for work and materials expended in repairing a road near Beldon Hill, on the ground that the said road was not one of the highways of Great Horton, and that the inhabitants of Great Horton were not liable to contribute to the repair of it: that in answer to such objection, *Bastow* (the surveyor) insisted that the said repairs were done under the authority of an order of justices; that deponent thereupon proposed to shew that the said order was obtained by fraud and collusion between the surveyor and another person: that the said justices decided to allow the items so charged without en-

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tering fully upon the case proposed to be set up by deponent, because they were of opinion that an appeal lay from their decision to the Court of Quarter Sessions. That deponent duly entered an appeal at the next quarter sessions against the said order for the allowance of the said accounts, but the sessions decided that they had no jurisdiction to hear such appeal. Two of the justices (three in number) who allowed the accounts, made affidavit also, stating "that they decided to allow the items so charged by *Bastow*, and objected to by *Ackroyd*, without entering as fully as they otherwise would have done upon the case proposed to be set up by the said *Ackroyd*, because deponents considered that an appeal lay from their decision to the Court of Quarter Sessions, before which court they were desirous that the case should be heard and decided, several questions of law being raised by the parties, which the deponents considered the Court of Quarter Sessions a fitter tribunal to decide than themselves, and likewise because they entertained doubts whether it was competent to them to receive evidence tending to nullify and invalidate the order so obtained. That for the reasons above stated they made the order for the allowance of the items in the accounts so objected to, but which, had they been aware that no appeal lay, they would not have done without a full investigation of the facts proposed to be brought forwards by the respective parties."

The Court called upon

*Starkie* and Sir *G. Lewin* to support the rule (a). By stat. 5 & 6 *Will. 4*, c. 50, s. 44, it is provided that if any person chargeable to the rate authorized to be made by this act has any complaint against such accounts, &c. it shall be lawful for any such inhabitant to make his complaint thereof to such justices at the time of the verification of such accounts, and *the said justices are hereby required to*

(a) This rule was argued during *Denman C. J.*, *Patteson* and *Williams Js.* the term, May 6, before Lord

*hear such complaint*, and, if they shall think fit, to examine such surveyor on oath, and to make such order thereon as to them shall seem meet." The obligation to hear the complainant is imperative. In the present case the justices refused a hearing from an error of judgment, which they are desirous to correct. The prosecutor, therefore, is entitled to this writ as a matter of right.

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*Baines and Pashley* contra. It does not appear on the affidavits that the justices refused to hear the complaint: they heard it in part, and then, conceiving that they were incompetent to deal with the case, they allowed the accounts on the ground that there was an appeal. The prosecutor did not object to that course, and is now precluded. This Court has frequently declined to reverse the decisions of quarter sessions, however erroneous, unless a case was stated; *Rex v. The Justices of Caernarvon* (a), *Rex v. James* (b), *Rex v. The Justices of Faringdon without* (c); more especially if the mistake, as in this case, was one of law; *In the matter of Pratt* (d). In *Rex v. The Inhabitants of Frieston* (e) the sessions rejected evidence, and dismissed the appeal against an order of removal: the appellants were not heard. Lord Denman C. J. said, "It is said the justices were mistaken in their decision; but, if they were, they are the judges of the law; and we cannot grant a new trial." And per Taunton J., "The sessions have refused to admit a piece of evidence, erroneously as it is said; but at all events they have heard the appeal, and they have not sent up a case." So here the justices heard the case and made an order, though they declined to go fully into the items objected to. Secondly, the prosecutor came too late; he should have moved for this writ in the next term. [Lord Denman C. J. We feel inclined to make the rule


(a) 4 B. &amp; Ald. 86.

(b) 2 Mau. &amp; S. 321.

(c) 4 D. &amp; R. 735.

(d) 7 A. &amp; E. 27 a; S.C. 2 N. &amp; P. 102.

(e) 5 B. &amp; Ad. 597.

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absolute if we have the power; but that appears to be very doubtful.]

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—We think we have no power to issue this mandamus to two justices to hear and decide on the allowance of accounts, they having already done so, though under a mistaken notion that an appeal lay to the sessions, and though they are now anxious to enter upon the merits of the case. To unravel the grounds and motives which may have led to the determination of a question once settled by the jurisdiction to which the law has referred it, would be extremely dangerous; but many authorities prove that it is beyond our own competency, and there is none to the opposite effect.

Rule discharged.

END OF EASTER TERM.

## TRINITY TERM,

IN THE FOURTH YEAR OF THE REIGN OF VICTORIA, 1841.

—◆—

The Judges in Banc this Term were,  
 Lord DENMAN C. J.                      WILLIAMS J.  
 PATTESON J.                                COLERIDGE J.

—

In the Bail Court,  
 WIGHTMAN J.

—◆—

BRUNTON and others v. HALL.

*Tuesday,  
 May 25th.*

CASE for the disturbance of a right of way. The declaration stated the possession by the plaintiffs of "a certain messuage or tenement, situate &c., and also of a certain stable, with a loft above the same, and a certain messuage or slaughter-house, respectively situate and being in a certain yard called &c.," "and by reason thereof" the plaintiffs had "a certain way from and out of, &c. for themselves and their servants, on foot, to go, return, pass and repass, and also to lead and carry away out of the said yard all the manure which was or might be made on the premises above mentioned, every year, at all times of the year, at their free will and pleasure." The declaration then alleged that the defendant hindered the plaintiffs and their servants from passing and repassing on foot, and from carrying and leading away any part of the manure. The pleas were, 1st, not guilty; 2d, a traverse of the right of way claimed; and 3d, leave and license.

A reservation in a lease of a right of way on foot, and for horses, oxen, cattle and sheep, does not give any right of way to lead manure.

At the trial before *Coltman J.*, at the summer assizes for the county of Northumberland, it appeared in evidence that the plaintiff and defendant occupied adjoining houses, at the back of which was a yard common to both. The plaintiff

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claimed a right of way through the house of the defendant. Both houses, with the land, were the property of one *Robert Smith*, under whom, or his mortgagee, both parties derived their respective rights. By a demise, bearing date the 10th April, 1830, of the house which the defendant occupied, *Robert Smith* and his mortgagees demised it for twenty-one years, "subject to the free right of way, on foot and for horses, oxen, cattle and sheep, which the said *Robert Smith* (and his mortgagees and cestui que trust) did thereby reserve to themselves, and to the tenants and occupiers for the time being, of the other parts of the tenements comprised in the aforesaid indentures of lease and release, from time to time and at all times during the continuance of the term thereby granted, along and through the common passage leading from Aldgate Street aforesaid to premises situate behind and adjoining the said thereby demised premises." On the 27th April, *Smith* demised to one of the plaintiffs, the alleged dominant tenant, "with all ways, paths, passages, water-courses, profits, commodities, advantages, emoluments and appurtenances whatsoever, to the said demised hereditaments and premises belonging, or in anywise appertaining, or henceforth held, used or enjoyed therewith."

The proof in respect of the issue joined upon the plea of not guilty was, that a servant of the plaintiff was removing manure in a wheelbarrow, when the latter obstructed him and refused to let him pass with the wheelbarrow. It was objected, on the part of the defendant, that there having been a unity of seisin and possession before the 10th April, 1830, all previous ways were extinguished, and, with respect to new rights, that the plaintiffs could have at all events no greater right under the demise from *Smith* than the latter had himself, which must be determined by the words of the reservation in the lease, to which he was a party, of the servient tenement, and that under that reservation the right of way of *Smith*, and those who claimed under him, would not be so extensive as that which was claimed in the declaration, inasmuch as that claimed a right to lead manure, as to which

the reservation was silent. The learned judge overruled the objection, and the plaintiff had a verdict.

In Michaelmas term following, *Alexander* obtained a rule to shew cause why there should not be a new trial, on the ground of misdirection, against which,

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*Cresswell* and *Otter* now shewed cause. It must be conceded that the rights of the plaintiff are conterminat with the reservation in the defendant's lease, but that reservation receiving a liberal interpretation, is sufficient to support the right claimed by the plaintiff, or at all events if it does not support the right to the full extent claimed in the declaration, it does so partially, and the plaintiff is entitled to retain his verdict in respect of so much of his claim as is supported by the reservation, on the principle of the decision in *Ricketts v. Salwey* (a), where, in an action on the case for disturbance of a right of common of pasture, the right was claimed by reason of the possession of a messuage and land, and it appeared he was possessed of land only, and entitled to a right of common in respect of it, it was held that the allegation of the right was divisible, and the plaintiff entitled to recover damages in respect of the right which he proved. If the word "lead" be rejected, the right claimed was proved. [Lord *Denman* C. J. The plaintiff wants that part of his declaration to maintain his action, that right was the only one disturbed, and without that part of the claim in the declaration the defendant would have succeeded on the plea of not guilty.]

*Knowles*, in support of the rule, was stopped by the Court.

Per CURIAM (b).—The principle, which determines when an allegation of a right is divisible, has recently been much

(a) 2 B. & Ald. 360.

(b) Lord *Denman* C. J., *Patterson, Williams and Coleridge* Js.



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considered in this Court, in a case relating to the corporation of Stamford (*a*). To support the verdict in this case, the plaintiff contends for the divisibility of the right itself, and if that can be done he ought to have taken a restricted verdict at the trial, but a general verdict has been found, which cannot be supported. There can be no doubt of the meaning of the word "lead," that it means carrying in some species of vehicle; the plaintiff has no such right, and no other right has been disturbed.

Rule absolute.

(*a*) *Semble Beardsworth v. Torkington*, argued in T. T., and in which the judgment was delivered on the second day of this term. *Vide post*.

It was contended also, on behalf of the plaintiff, that "to lead manure" might mean nothing more than to carry manure, and that if he had a right of way he might, in the exercise of it, carry burdens. The authorities however seem to be much against the proposition, that a right of passage would in general give a right to transport burdens in the several modes in which the right of way might be exercised. See *Ballard and Dyson*, 1 Taunt. 279; *Higham v. Rabett*, 7 Scott, 827; and particularly *Cowling v. Higginson*, 4 M. & W. 245. These cases seem distinctly to shew that there is no positive division of rights of way into distinct classes. Where the extent of the right is to be inferred from user, it is for the jury to say, under all the circumstances attendant upon the user, what is the right; and where the right is conferred by deed, the deed itself must be looked to for the same purpose.

Indeed in the civil law, from which the early writers have adopted their technical terms, it would appear there was no rigorous classification of rights of way, unless the very terms "iter, actus or via," to which a particular meaning was attached, were adopted. The qualifications of ways seem to have been as numerous as in the English law, ex. gr. what kind of vehicle should be used or prohibited; that the way should only be used with a horse, or that a fixed weight or a particular commodity only should be conveyed, &c. So also it might be granted to be enjoyed only at certain days or hours. *Modum adjici servitutibus posse constat: veluti quo genere vehiculi agatur, vel non agatur veluti ut equo duntaxat, vel ut certum pondus vehatur, vel grex ille transducatur, aut carbo portetur.*—L. 4, § 1. *De Serv.* *Usus servitutum temporibus secerni potest: forte, ut quis post horam tertiam usque in horam decimam eo jure utatur, vel ut alternis diebus utatur.*—L. 5, § 1.

As to the right of conveying burdens as attendant upon a right of way, it is true that, according to

the civil law, a man having the right termed "*iter*," which was a right to pass on horseback as well as on foot, might be carried in a litter, but he could not drive a beast of burden along it. So the right termed "*actus*," which was a right of passage for beasts of burden and carriages, gave no right to pass with waggons. "*Qui sella aut lectica vehitur ire non agere dicitur. Jumentum vero ducere non potest, qui iter tantum habet. Qui actum habet, et plaustrum ducere, et jumentum agere potest. Sed trahendi lapidem aut tignum, neutri eorum est.*"—L. vii. ff. de Serv. Præd. Rust. *Pothier*, in a note on the term "*plaustrum*," says, "*Id est currum; non verum plaustrum trahendis oneribus aptum.*"

It is obvious, that to hold a right of way per se gave a right to carry burdens would impose a much more onerous obligation on the servient owner, for if he wished to build or plant trees on his tenement, he must leave a higher space than

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he would otherwise be obliged to do. For this reason it was, in the civil law, that the opinion was generally entertained that neither the *iter* nor *actus* gave the right to pass carrying a pole erect. "*Quidam nec hastam rectam ei ferre licere; quia neque eundi, neque agendi gratia id faceret, et possunt fructus eo modo lædi.*"—L. 7, de Serv. Præd. Rust. *Pothier's* note on this passage is as follows "*Quidam jus rectæ hastæ ferendæ quod in servitute viæ contineri dicitur, in servitute actus non item, ita intelligunt; ut in servitute viæ non solum duntaxat ad certam latitudinem, sed etiam cælum serviat intra eum altitudinum quæ hastæ ferendæ par sit; adeo ut is cui servitus debetur, possit plaustrorum suorum onus usque ad hanc altitudinem exaggerare; ille vero qui eum servitutem debet, non possit in loco per quem via debetur, infra hanc altitudinem quidquam habere; puta deambulationes arboribus opacas, quæ servituti nocerent. Ita Maranus ad h. tit.*"

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### THE QUEEN v. POLWART.

Monday,  
May 24th.

**RULE** to shew cause why an inquisition, taken on the body of *William Henry Sheen*, should not be quashed. The inquisition found "that *Joseph Polwart*, late of &c., mariner, on the 13th day of February, in the year aforesaid, with force and arms, at the parish &c., in and upon the said *William Henry Sheen*, in the peace of God and our said Lady the Queen, at the parish &c. then being, feloniously did make an assault, and that the said *Joseph Polwart*, at

A deodand cannot be imposed by a coroner's jury upon the instrument of death, where they find the homicide to have been felonious.

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the parish &c., then being master and commander of a certain steam-boat called the Manchester of Berwick, of the value of eight hundred pounds, at &c., then navigating upon a certain navigable river called the Thames, and the said *William Henry Sheen*, of &c., being then on board a certain vessel called the Tyrian, he the said *Joseph Polwart*, at &c., feloniously did then navigate, propel and force the said steam-boat, called the Manchester of Berwick, in, upon and through the waters of the said river, against and over the said vessel called the Tyrian, whereby the said vessel called the Tyrian, at &c., then was sunk in the waters of the said river, and by means whereof the said *William Henry Sheen* was, at the parish of &c., then feloniously forced into the said river and into the waters thereof, and in and by the said waters was, at &c., then suffocated and drowned, of which said suffocation and drowning the said *William Henry Sheen*, at &c., then instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said *Joseph Polwart*, him the said *William Henry Sheen*, in manner and by the means aforesaid, feloniously did kill and slay, against the peace of our said Lady the Queen, her crown and dignity." The inquisition then proceeded in the usual form to find that the Manchester was moving to the death, and that it was of the value of 800*l*.

The principal objection taken to the inquisition, and the one on which the Court founded its judgment, was, that it found a felonious killing, and at the same time imposed a deodand on the thing moving to the death; other objections were taken to the terms of the finding of the manslaughter.

The *Attorney-General*, in appearing to shew cause (a) against the rule, took a preliminary objection, that the inquisition was not a nullity, and therefore ought not to be quashed; that if the inquisition were good as to the first part charging the death to have been manslaughter, and bad only

(a) H. T. Wednesday, January 27.

as to the finding of the deodand, the imposition of the deodand could not be enforced by levy; and, if that was attempted, relief might be had in the Court of Exchequer. He cited a case of *The Queen v. The Grand Junction Railway Company* (a).

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Lord DENMAN C. J.—It cannot be said that this is an improper application. The Court in the exercise of its discretion may refuse to interfere, where it is doubtful whether upon the finding a deodand can be levied, and no attempt has been made to enforce the imposition of it, or appears to be intended. The case cited is quite consistent with *Ex parte Carruthers* (b), where that part of an inquisition which found the deodand was quashed, and the rest was allowed to stand. It is said by Sir Michael Foster (c) that this Court “hath frequently interposed its authority as sovereign coroner in this case, and also in the case of suicide, in favour of the subject, and to save the forfeiture, but will not do it in either case to his prejudice.”

Sir W. W. Follett in support of the rule. The principal question is, whether a practice, which has grown up during the last few years, of finding a felonious offence, and also fixing a deodand upon the inanimate thing, or animate beast, moving to or causing the death, can be supported. No precedent can be discovered in the books of such a finding. It is important to observe that this inquisition does not find that the person charged with manslaughter used a weapon of a certain value, so that the forfeiture of it might be claimed by the crown on that ground, but it finds merely that the ship was moving to the death. Deodands had their origin in the superstition of our ancestors. In cases of accidental death, they considered the things immediately causing it accursed, and they were forfeited, “to be applied to pious purposes,

(a) This case is reported in 3  
P. & D. 57.

(b) 2 M. & R. 397.

(c) C. C. Homicide, p. 266.

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for the soul of the deceased (a)." The definitions of a deodand in the ancient text writers shew clearly that it could be found only where the cause of death was accidental, and where no blame was imputable to any person. In the 3d Institute, 57, a deodand is said to be, "when any moveable thing inanimate, or beast animate, do move to or cause the untimely death of any reasonable creature, by mischance, without the will, offence, or fault of himself or of any person." Sir *M. Foster* says, "Accidental death, which happeneth without the intervention of human means, induceth a forfeiture, which the ignorance and superstition of ancient times called a deodand." *Foxley's case* (b), *Staundford* (c), Doctor and Student, 259, *Com. Dig.* tit. Waif (E 1), *East*, P. C. 386, treat of deodands as occurring only in cases of death by mischance. The stat. 4 *Edw.* 1, s. 2, *De Officio Coronatoris*, distinguishes the cases of death by felony and by accident, directing the coroner, in the former case, to find the value of all the goods of the person charged; in the latter, only of the thing causing the death. According to the law of deodand, the Tyrian was as much forfeited as the Manchester; and indeed it does not distinctly appear that the Manchester was the cause of the death at all.

The *Attorney-General* contra: It is no objection to this inquisition, that it imposes a deodand on the occasion of a felonious killing. There may be deodands of different kinds, one where the death is per infortunium, the other where it is occasioned by violence, and, referring to the superstitious origin of deodands, there is surely at least as much reason to say that the immediate instrument of death would be looked upon as an accursed thing in the latter case as in the former. The authority of *Blackstone*

(a) *Foster's C. C. Homicide*, 265; Lord Coke, 3 *Inst.* 57, says, "being pretium sanguinis the price of blood, they are forfeited to God, that is, to the king, God's lieute-

nant on earth, to be distributed in works of charity, for the appeasing of God's wrath."

(b) 5 *Co.* 160.

(c) P. C. 20.

fully bears out this argument (a). Speaking of deodands, he says, "It matters not whether the owner were concerned in the killing or not; for if a man kills another with my sword, the sword is forfeited as an accursed thing. And therefore in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as that the stroke was given by a certain penknife, value six-pence), that the king or his grantee may claim the deodand; for it is no deodand unless it is presented as such by a jury of twelve men." Other text writers take the same view, thus in *Jervis* on the law of coroners, it is said, "Deodands are due not only in cases of homicide by casual death, but in all other homicides." In the *Case of the Lord of the Manor of Hampstead* (b), where a deodand was imposed, it would appear there was negligence, for the death there was occasioned by driving a cart upon a high bank, in the endeavour to pass a waggon, and it was held that not only the waggon but the cart were deodands. On a conviction for felony, all the felon's moveable property passed to the crown, and, in cases of conviction for felonious homicide, the instrument of death was also forfeited, even if it were the property of another. This vessel, the *Manchester*, was therefore forfeited to the crown, by the finding that it was the instrument of the felonious killing, and the latter part of the inquisition, the finding that it moved to the death, may, if necessary, be rejected as surplusage.

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Sir *W. W. Follett*. There is no authority for saying that on a felonious homicide the instrument of death was forfeited if the property of another. If the original authorities, on which that proposition must depend, be referred to, it will be found that they are confined to cases of death by mischance, which subject alone is treated of where the passage occurs, treating as a deodand the sword of a third person, when the immediate cause of death. Whether the instrument of a felonious homicide is to be forfeited or not,

(a) 1 Bl. Com. 301.

(b) 1 Salk. 320.

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must depend upon the ultimate verdict of the jury on the trial of the offender, but a deodand, properly so called, may be levied at once.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—This was a motion to quash an inquisition, taken before the coroner of Essex, on the body of *Robert Mason*, by which a verdict of manslaughter is found against *Joseph Polwart*, in navigating a steam-boat, and a deodand of 800*l.* is laid upon the steam boat.

Some objections were taken to the language and form of the inquisition, but the principal point was, whether a coroner's jury can lay a deodand in any case where they find a verdict of murder or manslaughter.

We are of opinion that they cannot, and that the latter part of the inquisition, which relates to the deodand, must be quashed, as was done by this Court in the case of *Ex parte Carruthers* (a).

All the authorities in our law books, treat deodands as being due where the death is by misadventure, and no one instance has been adduced or can be found where a deodand has been laid where a verdict of murder or manslaughter has been found.

Whatever may have been the origin of deodands, we can find no reason for believing that they were regarded in the light of fines imposed on a person guilty of some misconduct, which brought about the fatal event; and indeed the principles on which they were established are so entirely matter of conjecture, that we do not feel called upon or justified at the present day to extend their application, but rather to limit them strictly to the cases in which we find them established by practice and recognized by the law.

Lord Coke, in the 3d Institute, chap. 9, has these words, "Deodands are when any moveable thing inanimate, or beast animate, doe move to or cause the untimely death of

(a) 2 Man. & Ry1. 397.

any reasonable creature by *mischance*, in any county of the realm (and not upon the sea or upon any salt water), *without the will, offence, or fault of himself or any person.*"

The statute *De Officio Coronatoris*, 4 *Edw.* 1, st. 2, speaks of deodands, in the latter part, unconnected with the offence of murder, or any other offence.

Lord *Hale*, in his *Pleas of the Crown*, chap. 32, treats of deodands, and all the cases which he discusses are of death by misadventure. He says that the inquisition ought to inquire of the goods that occasioned the death, and the value of them, and the villata *where the mischance happened* shall be charged with process for them. He adds, "And this is the reason that, in every indictment of murder, manslaughter, &c. the indictment finding that he was killed with a sword, staff, &c. ought also to find the price, because the king is entitled to that instrument."

No doubt that is so, and whether the king be entitled to the instrument will depend, in such case, upon the finding of the jury, by whom the party is tried on such indictment, and therefore the coroner's jury might well have found that *Joseph Polwart* navigated a steam-boat of the value of 800*l.*, and in such a manner as to be guilty of manslaughter, and the forfeiture would depend upon the subsequent trial. But here they have found that the steam-boat was moving to the death of *R. Mason*, as a distinct and substantive finding, creating a forfeiture at once, which is only proper to be done where the inquisition is final, as in cases of misadventure, and no ulterior steps are to be taken.

Lord *Hale* goes on in his next chapters to treat of murder and manslaughter, but in no passage mentions deodands in connection with those offences.

In *Fleta*, book 1, ch. 25, deodands are treated in the same manner in connection with death by misadventure.

So in *Bac. Abr.* tit. Deodands; in *Foster's Crown Law*, tit. Deodand, p. 265; in *East's Pleas of the Crown*, 386; in 1 *Hawkins's Pleas of the Crown* book, 1, ch. 8(a); in

(a) Curwood's ed.

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*Staundford*, P. C. p. 20; in 5 Rep. 110, *Forley's* case, the same sort of language is used.

We have therefore no difficulty in saying that this finding of a deodand, in a case of manslaughter, now for the first time introduced, is bad, and that the inquisition, so far as regards that finding, must be quashed.

Rule absolute to quash that part of the inquisition which found a deodand.

G.

*Wednesday,*  
*May 26th.*

DOE d. ROBINSON v. DOBELL.

A house and appurtenances by a written demise were demised "for one year and six months certain from the date," at a yearly rent, "payable at the usual periods," with a proviso "that three calendar months' notice should be given on either side, previous to the determination of the said tenancy."

The holding having continued beyond the term of the year and six months, held, that such holding was not a new tenancy, commencing at the end of that period, but a yearly

tenancy commencing upon the original entry of the tenant, and that therefore a notice to quit at the expiration of the second year of the holding was good.

**EJECTMENT.** At the trial before *Coleridge J.* at the sittings in Middlesex after last term, it appeared that the defendant had become tenant to the lessor of the plaintiff of the premises sought to be recovered, by a demise in writing, bearing date the 13th of August, 1838, by which the lessor of the plaintiff agreed to let, and the defendant to take, a house and appurtenances "for one year and six months certain from the date thereof, at the yearly rent of 26/., payable at the usual quarterly periods, the first payment being to be made on the 29th September then next. It was further agreed, "that three calendar months' notice should be given on either side previous to the determination of the said tenancy:" the landlord also agreed to allow to the tenant the sum of 3/ 5s. out of the first quarter's rent. The defendant entered upon the possession of the premises, and continued in the occupation of them after the expiration of a year and six months from the date of the demise, and on the 7th May, 1840, he being then in possession, the lessor served on him a written notice to quit, in the following form:—

"I do hereby give you notice to quit, and deliver up unto me, on or before the thirteenth day of August next, or at the expiration of the

current year of your tenancy which shall expire next after the end of three months from and after your being served with this notice, &c."

The demise in the declaration was laid on the 5th October, 4 *Vict.* (1840). It was objected on the part of the defendant that it must be taken there was a tenancy from year to year between the parties, commencing on the expiration of the year and six months certain, mentioned in the demise, and that consequently the notice to quit must be taken to be to quit at the end of that year, and that therefore the ejectment was brought too soon. The learned judge overruled the objection, and the lessor of the plaintiff had a verdict.

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*S. Hughes* now moved for a new trial on the same ground. The notice is to quit at the end of the current year, and the question is, whether the yearly holding after the expiration of the time specified in the express demise is to be taken to commence at the expiration of the year and a half, or whether it must be considered to begin at the expiration of the first year. On the part of the defendant the latter construction is contended for, and is supported by authorities. [*Coleridge J.* The rent was payable at the usual periods.] The tenancy created by the demise was for at least a year and a half, *Thompson v. Maberley* (a), *Doe d. Chadborn v. Green* (b), and might have been determined at the end of that time, if it was not a new tenancy commenced from that period, the years of which must be computed from it: *Co. Litt.* 45, *Manchester College v. Trafford* (c), *Legg v. Strudwick* (d), *Roe d. Jordan v. Ward* (e), *Bro. Abr. Lease B.*, *Bac. Abr. Leases and Terms for Years L.*

LORD DENMAN C. J.—It appears to me, as it did to my brother *Coleridge*, that the yearly tenancy must be referred to the time of entry.

(a) 2 Campb. 573.

(b) 1 P. & D. 454.

(c) 2 Show. 31.

(d) 2 Salk. 413.

(e) 1 H. Bl. 97.

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PATTESON J.—The term “current year” must always be referred to the time of entry if that appears. It is true that, according to this construction, the expression “six months’ certain” has no meaning, the tenancy having continued beyond it, but that is the fault of the parties.

WILLIAMS and COLERIDGE Js. concurred.

G.

Rule refused (a).

(a) See the authorities reviewed in the case of *Rex v. Herstmonceux*, 1 M. & R. 426; S. C. 7 B. & C. 551, supporting the proposition that when a yearly tenancy is continued a number of years, the lessor and the lessees being the same, it may be treated after the

expiration of the tenancy as an original demise for the whole period occupied, and that a liability existing during the time to determine the tenancy by a fixed notice, or at a certain period, makes no difference in the legal effect of the occupation.

Friday,  
 June 11th.

DOE *d.* PARR *v.* ROE.

The Court will not let in a corporation to defend an ejectment without entering into the usual consent rule to admit possession, on the ground, whether well or ill founded, that the land of a corporation cannot be taken in ejectment on a writ of elegit upon a judgment against the

**RULE** to shew cause why the declaration in ejectment, and rule for judgment against the casual ejector, should not be set aside for irregularity, or why the corporation of Poole should not be allowed to defend without confessing themselves in possession, as required by the rule Michaelmas term, 1 *Geo.* 4 (b).

The declaration was served in July last; early in Michaelmas term the rule for judgment against the casual ejector was obtained, and the present rule was moved for in Hilary term. On the 28th November a summons was served for further time to appear and plead. This action of ejectment

(b) 4 B. & Ald. 198.

corporation for debts contracted since the passing of the Municipal Corporation Act.

It is too late in Hilary term to seek to set aside for irregularity of service a declaration in ejectment served in the July previous, and a rule for judgment obtained in Michaelmas term, the defendant having in the vacation following applied by summons for time to appear and plead.

was founded upon a writ of *elegit* previously issued against the corporation of Poole.

*Erle* and *Ball*(a) shewed cause. To the first part of this rule it is sufficient to say, without inquiring into the nature of the service of the declaration, that it is too late now to object to it for irregularity. Taking a step in the cause, as the application for time was, admits the regularity of the prior step, viz. the service of the declaration (b). The case of *Doe d. Earl of Carlisle v. Woodman*(c) was cited to shew that ejectment would not lie against a corporation, but the tendency of the case is the otherway. According to the rule Michaelmas term, 1 *Geo.* 4, possession must be confessed before a defence can be allowed.

Sir *W. W. Follett*, in support of the rule. One very important question in this case is, whether ejectment will lie against a corporation, grounded on an execution upon a judgment against them for a debt contracted since the passing of the Municipal Corporation Act, because strictly speaking a corporation has no property at all, as all property they nominally possess, they merely hold as trustees for the whole borough; and by the Municipal Corporation Act, 5 & 6 *Will.* 4, c. 76, s. 92, it is to be applied to the borough fund. For this reason it is that it is not liable to be rated to the poor rate; *Reg. v. Mayor and Corporation of Liverpool*(d), *Reg. v. Exminster*(e). The statute 6 & 7 *Will.* 4, c. 104, s. 1, shews that it was necessary to pass an act to enable the corporations to enter into bonds even for old debts. The land of the corporation is not part of the

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(a) On Saturday, May 22nd, before Lord Denman C. J., *Patterson, Williams and Coleridge* Js.

(b) It was also contended that the service was good, 2 *Tidd*, 1219 (9th ed.); *Doe d. Coopers' Company v. Roe*, 8 *Dowl. P. C.* 134;

and the statute 2 & 3 *Will.* 4, c. 39, s. 13; and *Thorpe v. Beer*, 2 B. & Ald. 373, were cited.

(c) 8 *East*, 228.

(d) 9 *Ad. & E.* 435; *S. C.* 3 *N. & P.* 280.

(e) 4 *P. & D.* 69.

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borough fund, but the income arising from it is. The borough fund must be looked to to satisfy the liabilities of the corporation; and, if that is not sufficient, a borough rate must be resorted to. [*Patteson J.* If a bond be given as directed by the act, how is it to be enforced?] By mandamus. [*Patteson, J.* Why may not the obligee sue upon it also? I see nothing in the act to prevent a corporation from having property.] But if their defence is, that they have only such an interest in the land as they would not be liable to be deprived of by ejectment, and if part of their defence is, that they are not in possession, why are they to be deprived of that defence? To make this rule absolute would merely put the corporation in the same position they would be in but for the rule of court, Michaelmas term, 1 *Geo.* 4, and as tenants in common still are.

*Cur. adv. vult.*

Lord DENMAN C.J., now delivered the judgment of the Court.—This was an application by the corporation of Poole to be allowed to defend, without entering into the usual consent rule confessing themselves in possession, according to the rule of Court, Michaelmas term, 1 *Geo.* 4.

The lessor of the plaintiff claims under a writ of elegit, sued out against the corporation, and this application was made upon the supposition that the corporation, by confessing themselves to be in possession of the premises, would prejudice themselves as to the defence which they mean to set up, namely, that by the stat. 5 & 6 *Will.* 4, c. 76, their property is applicable to public purposes only, and not liable to be taken in execution.

In this stage of the proceedings we are not called upon to decide whether such be the effect of the statute in question, but we wish to be understood as not giving any countenance to the supposition that corporate property, although directed by the statute to be applied to public purposes, and not to the private benefit of the members of the cor-

poration, is protected from the lawful claims of any persons having demands of any kind upon the corporation.

But, whether such defence will avail the corporation or not, we are satisfied that they will in no respect be prejudiced as to it by confessing possession of the premises in question. The object of the rule of Michaelmas term, 1 G. 4, was merely to prevent the necessity of proving the identity of the premises in litigation, at the trial, by which necessity plaintiffs had been frequently defeated, without the merits of the case being at all investigated. The confession admits nothing at all but that the defendants defend for certain specified premises, and we see no reason whatever why a corporation should be placed in this respect in a different situation from any other defendants.

As to the other part of the rule for setting aside the declaration and rule for judgment against the casual ejector for irregularity, we are clearly of opinion that the application was very much too late.

G.

Rule discharged.

BELL v. TWENTYMAN.

Monday,  
May 24th.

CASE for an injury to the plaintiff's reversionary estate, by causing water from a watercourse on the defendant's land to flow upon and under the house and land of the plaintiff, in the occupation of his tenant. The declaration stated that before and at the time, &c. a certain dwelling-house, garden and premises, with the appurtenances, were in the possession and occupation of one *Jane Burney*, as tenant thereof to the plaintiff (the reversion thereof then and under the house and land in the occupation of the plaintiff's tenant, the defendant pleaded, that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land, that in consequence it fell into the watercourse, and caused the damage, and that within a reasonable time after the defendant had notice he removed it:—Held to be a bad plea, it not shewing any obligation on the tenant to repair the wall merely as terre-tenant. *Quære*, whether it would have been good if it had.

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In case for an injury to the plaintiff's reversionary interest by the defendant's, obstruction of a watercourse on his land and thereby sending water upon

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and still belonging to the plaintiff), and the defendant, during the time aforesaid, was and still is possessed and in the occupation of a certain close near to the said dwelling-house, garden and premises, so in the possession and occupation of the said *Jane Burney*, as tenant thereof to the plaintiff as aforesaid. That long before and at the time of the committing of the grievances by the defendant as hereafter next mentioned, there was and still is a certain watercourse in the said close of the defendant, and for a long time before and at the time of the committing of the grievances by the defendant as hereafter mentioned, the defendant, by reason of such his possession of the said close, of right ought to have scoured, cleansed and kept open, and still of right ought to scour, cleanse and keep open, the said watercourse, when and so often as it hath been or should or might be necessary to prevent the water, from time to time being in the said watercourse, from being hindered and prevented running and flowing in and along the same, and also to prevent it running out of the same unto, into and under the said dwelling-house, garden and premises, and the walls and floors thereof, and doing damage there to the said dwelling-house, garden and premises, and the walls and floors thereof: yet the defendant, well knowing the premises, but not regarding his duty in that behalf, and contriving and wrongfully intending to injure, prejudice and aggrieve the plaintiff in his reversionary estate and interest of and in the said dwelling-house, garden and premises, with the appurtenances, whilst the same were so in the possession and occupation of the said *Jane Burney* as tenant thereof to the plaintiff as aforesaid, and whilst the plaintiff was so interested therein as aforesaid, to wit, on the 1st day of October, in the year of our Lord 1838, and from thence for a long time, to wit, until the commencement of this suit, wrongfully and unjustly permitted and suffered the said watercourse to be and continue, and the same was for and during all the time greatly stopped, choked up and impeded with divers large

quantities of mud, filth, earth, dirt and rubbish, for want of needful and necessary cleansing, scouring and keeping open the said watercourse, insomuch that the water in the said watercourse was, during all the time aforesaid, penned back, hindered and prevented from running and flowing in and along the same, and ran out of the same, which it otherwise would not have done, and by means whereof divers large quantities of water, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, were penned back, and were hindered and prevented from running and flowing in and along the said watercourse, and ran and flowed from and out of the said watercourse, and out of its usual and proper course and channel unto, into and under the said dwelling-house, garden and premises of the plaintiff, and the walls and floors thereof, and by reason of the premises aforesaid, the said dwelling-house, garden and premises, and the walls and floors thereof, have been and are greatly injured, deteriorated and lessened in value, and the plaintiff has been and is thereby greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said dwelling-house, garden and premises, with the appurtenances, so in the possession and occupation of the said *Jane Burney* as tenant thereof as aforesaid.

Plea: that before and at the times when &c. such parts as hereinafter mentioned of such wall and buildings as hereinafter mentioned, and also before and at the times of the grievances in the said declaration mentioned, a certain wall and building, parcel of the said premises with the appurtenances, in the possession and occupation of the said *Jane Burney* as in the said declaration mentioned, as such tenant thereof as therein mentioned, and the reversion whereof belonged to the plaintiff as therein mentioned, was situate near to the said watercourse and to the said close of the defendant, and by reason of the said wall and buildings, so being parcel, &c. as aforesaid, before and at the days hereinafter next mentioned, being by and through the

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neglect and default in that behalf of the said *Anne Burney*, as such tenant thereof as aforesaid, in bad and insufficient condition and repair, and in a bad, ruinous and dilapidated state and condition, divers parts of the said wall and building, near to the said watercourse, before and at the said times when, &c., to wit, on the 1st day of September, A. D. 1838, and on divers other days before and afterwards, fell down, and became and were prostrated, and by means thereof, and when the same so fell down as aforesaid, divers large quantities of stones and mortar and rubbish, to wit, two cartloads of stones, two cartloads of mortar, and two cartloads of rubbish, being part of the materials whereof the said part of the said wall and building had consisted and been composed, before and at the same times when, &c. in the declaration mentioned, to wit, on the several days last aforesaid, fell and rolled into, and became and were placed in the said watercourse, and thereby, and by reason of the same continuing and remaining therein, the said watercourse became and was stopped, choked up and impeded, and by reason thereof the said mud, filth, earth, dirt and rubbish, in the said declaration mentioned, became and were obstructed and collected therein, and the said watercourse became and was stopped up, choked up and impeded, as in the said declaration mentioned, with the said mud, filth, earth, dirt and rubbish therein mentioned, and the water in the watercourse for a short space of time necessarily and unavoidably was penned back, hindered and prevented from running and flowing in and along the watercourse as in the said declaration mentioned, and ran out of the same as in the said declaration mentioned, which are the same stopping up, choking up and impeding of the said watercourse as in the said declaration mentioned. And the defendant further says, that in a short and reasonable time after he had notice that the said watercourse was stopped up and choked up, and impeded as aforesaid, and before the commencement of this suit, to wit, on the 4th day of September, A. D. 1838, and on

divers other days and times before and afterwards, he, the defendant, duly, properly and sufficiently cleansed, scoured and opened out the said watercourse, so that the waters thereof flowed in and along the said watercourse as they ought to do freely and without obstruction. Verification.

General demurrer and joinder.

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*Ramshay*, in support of the demurrer (a). The plea sets up a defence in two different points of view; first, that it was the act of the plaintiff's tenant, in allowing the wall to be out of repair, that caused the obstruction; and secondly, that the defendant removed the obstruction in a reasonable time after he had notice. The plea is no answer to the action. The plaintiff is not responsible for the act of the tenant any more than for the act of any stranger; nor was he bound to give notice of the obstruction, and applying the rule that notice must be given where a fact lies more within the knowledge of one party than another, the obstruction was a fact at least as much within the knowledge of the defendant as of the plaintiff. The plea indeed does not allege any duty in the plaintiff to give notice to the defendant; the want of such notice therefore can be no excuse. Nor does it even state that the defendant had notice within a reasonable time, or that he removed the obstruction within a reasonable time after the obstruction arose.

*Wightman* contra. In the plea the defendant admits his duty, but he denies that the apparent breach of it was occasioned by his own act, and shews that it was the act of the tenant, whom the plaintiff had placed in possession of the close, of the injury to which he complains, and who therefore must be considered the agent of the plaintiff. All the damage the plaintiff complains of in fact and in law was the act of his own tenant in dealing with the land

(a) In Hilary term last, Friday, C. J., *Littledale*, *Patteson* and Jan. 22nd, before Lord *Denman* *Coleridge* Js.

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which he held under the plaintiff. The damage proceeded from the non-repair of a wall, which the plaintiff or his tenant was bound to keep in repair. With regard to the other point, the plea does not allege a notice of the obstruction given by the plaintiff; but as it shows that the wrongful act proceeded from another, the defendant must have notice before he could remove it. "After notice of the obstruction," and "after the obstruction," are convertible terms.

Ramskay replied.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—We think this plea does not constitute any defence to the action. It does not appear by whom or under what circumstances the wall which fell down into the watercourse was built; for any thing that appears to the contrary it may have been built by the tenant herself for some temporary purpose of her own, unconnected with any benefit to be derived from it to any person claiming reversionary interests in the property, in which case they could not be affected in any way by any thing which happened to the wall. If the plea had stated that the owners and occupiers of the property were bound by any legal obligation to keep up and repair the wall so as to prevent its falling into the watercourse, that might admit of a different question—because, as the entirety of the estate would in that case be liable to the obligation, then as the management of the estate must necessarily be in the hands of the tenant, he represents the estate as far as this, and it might be contended that, the estate being bound, all persons interested in the estate were bound by the acts or omissions of the tenant, so that they could not complain if an injury to any reversionary interest was occasioned by his default; for his default would be the default of the estate and of all the several persons interested. However that question does not arise and need not be considered. Then

if the default of the tenant as stated in this plea be no answer, the only remaining ground of defence is, that the defendant cleansed and opened the watercourse as soon as he had notice of the injury.

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But we think that does not constitute a defence. If the defendant was liable on general principles, he was to cleanse and keep open the watercourse at all events; his cleansing and opening it as soon as he had notice, shews that he then acted properly and as a person in his situation ought to do, but that is no defence in point of law against a complaint for an antecedent injury. The action is not founded on malice or the breach of any moral duty, but is brought for a compensation for damage sustained by the neglect of a legal duty—and, if damage has been so sustained, the defendant is not the less bound to compensate for that, because he has very promptly repaired his fault. If the plea had stated that he cleansed and opened the watercourse as soon after the injury as it was possible to do it, that would have made no difference, for he was under an obligation to do it, and if he suffers in damages he must seek redress against the person by whose default he was compelled to pay the damages. The case of *Lord Egremont v. Pulman* (a) was an action brought by a reversioner of a close against the defendant for the non-repair of a gutter running through the close to the mill of the defendant, whereby the water oozed through and carried away the soil of the close; one defence was, that the injury was the consequence of a wrongful act of the tenant in possession of the close by penning back the water and watering his meadow. Lord Chief Justice *Tindal* said he thought this no defence as the owner of the reversion was suing for a permanent injury to his estate, and that he could not be met with the answer that the injury arose out of the wrongful act of the tenant, for which the defendant might have maintained an action against him. That was merely the personal act of the tenant, and it did not appear that there

(a) 1 M. & M. 404.

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was any legal duty in the owners and occupiers of the close to do any act, the neglect of which by the tenant had occasioned the injury; if there had been any such, it might perhaps have deserved consideration on the ground I have before mentioned.

In the present case there must be judgment for the plaintiff.

G.

Judgment for the plaintiff.

Monday,
 May 24th.

ABINGTON v. LIPSCOMBE.

Where a customary heriot of the best beast is due, on the death of a tenant, to the lord of the manor, no property in any specified beast vests in the lord before selection by him of the beast.


A selection of seven beasts as heriots, when the lord is entitled to five only, will not be sufficient to vest in the lord the property in any five of them.

Quere, whether in trover, if seven things are demanded when there is a right to five only of them, a general refusal is evidence of a conversion of such five.

TROVER for horses, &c. Pleas; not guilty, and that the plaintiff was not possessed of the horses, &c. as of his own property. At the trial before Lord Denman C. J., at the summer assizes, 1839, for the county of Kent, it appeared that the action was brought to recover certain beasts alleged to be due to the plaintiff as lord of the manor of Penshurst Halemore, in respect of customary tenements in the manor, upon the death of the defendant's father. The plaintiff claimed seven beasts as heriots, alleging them to be due in respect of seven distinct tenements in the tenure of the defendant's father; but it appeared that four of the tenements originally constituted but two tenements, and had become re-united, so as to reduce the plaintiff's claim to five heriots (a). The evidence of the plaintiff's bailiff was in substance as follows:—"In March, a day or two after the death of defendant's father, I went to mark seven beasts as heriots. I told the defendant why I came: he said, 'Very well,' and walked into the field, and helped me to them. I marked four horses there, one in the stables, two cows in the yard, and told defendant I was come to demand the cattle. He said he should refer it to his attorney, and should not deliver up the cattle to me."

(a) *Garland v. Jekyll*, 2 Bing. see *Holloway v. Berkeley*, 6 B. & 273; S. C. 9 Moore, 502. And C. 2; S. C. 9 D. & R. 83.

The only demand at any time was of seven beasts. It was objected that there was no evidence of a conversion. The learned judge reserved the point, by giving leave to the defendant to move to enter a nonsuit, and the plaintiff had a verdict (a). In the Michaelmas term following, *Platt* obtained a rule accordingly, against which

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Thesiger shewed cause (b). No demand of a particular beast was necessary, the lord being entitled to the best beast. What is due by heriot custom is certain, and the lord may seize it at once: *Woodlande v. Mantell* (c), *Odiham v. Smith* (d). The same principle applies to the lord's title to waifs and estrays: B. N. P. 33. [Lord *Denman* C. J. In that case there would be no selection to be made. How are we to know which is the best beast?] The bailiff marked the beasts; that would at all events vest the property in the lord; and the five first marked must be taken to be those selected. [*Patteson* J. Assuming that the property in the beasts was vested in the lord, what evidence was there of a conversion?] The demand and refusal. It is true the demand was too large; but the refusal was not put on that ground. A refusal cannot be made on one ground, and the defence put on another.


Platt and *Deedes* contra. Nothing had been done to vest the property in any specific beasts in the plaintiff. Marking seven will not pass any property in five, any more than marking or claiming all the beasts on the premises would. The bailiff ought to have stated for which tenement he took each beast. The cases cited of *Woodlande v. Mantell* (c)

(a) There was another question made, and fully argued in banc, whether heriots would attach in the case of an alienation by a tenant before his death to avoid the heriot liability. The Court expressed no opinion on this question.

(b) In Hilary term, on Wednesday, Feb. 3rd, before Lord *Denman* C. J. *Littledale*, *Patteson* and *Coleridge* Js.

(c) *Plowd.* 96.

(d) *Cro. Eliz.* 589.

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and *Odiham v. Smith* (a) are authorities that the property in a heriot does not vest in the lord without a specific selection. In *Odiham v. Smith* (a) it was held by all the justices that where the tenure is "that the lord shall have the best beast for a heriot, it is his election what he will take for the best, and what he conceives to be the best he may well take, although it be not so; and therefore the difference is betwixt a tenure of yielding annually *an* ox and of rendering annually his best beast; for in the first case it is in the tenant's election what he will render, but in the last the lord hath election what he will prender." But, even if the property vested, the demand and refusal were no evidence of a conversion, for there was an entire demand of seven beasts, and the refusal therefore was of that which the plaintiff had no right to demand, and therefore it is no evidence of a conversion. It is not like the case of a demand and a general refusal, where the holder seeks afterwards to set up a lien, for there nothing is demanded but what the demandant has a right to, were it not for the lien, which the possessor neglected to set up; but in this case the plaintiff, under no circumstances, has a right to that which he demanded.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action of trover for horses and cows, seized as heriots due to the lord of the manor of Penshurst Halemore, in respect of customary tenements. Not guilty was the first plea; the question on which was, whether a conversion was sufficiently proved, the facts being undisputed.

The plaintiff admitted on the argument that his claim was for five heriots only, not seven; and the evidence given by his bailiff on this preliminary point was in substance as follows:—"In March, a day or two after the death of defendant's father, I went to mark the beasts as heriots. I

(a) Cro. Eliz. 589.


told defendant why I came: he said, 'Very well,' and walked into the field, and helped me to them. I marked four horses there, one in the stable, two cows in the yard. I went in September, and told defendant I was come to demand the cattle: he said he should refer it to his attorney, and should not deliver up the cattle to me." This was said to be no conversion, because the demand was too large, for, if the demand had been correct, defendant might possibly have complied with it, and his refusal to give up seven when only five could be lawfully claimed, is no refusal to give up the five.

We are not satisfied with the answer that there was evidence of conversion without demand or refusal; for, though the bailiff marked the beasts, he left them in defendant's possession, which was lawful, till a proper demand made.

But it was answered, secondly, that a demand of all is in truth a demand of each, and that the detention of all is the detention of each. The ground of refusal may also be material. If defendant had refused the seven, but declared himself ready to give up five, and the bailiff had persisted in demanding all, and declined a smaller number, the demand would have been wrong, and the refusal justifiable. But in this case, though the demand was too large, the refusal proceeded on the ground that no heriot was due, and imported that defendant would part with none of the beasts seized; and it is correct to say that that conduct of defendant, which is charged as a conversion, must be taken altogether and with all its circumstances. But the objection here arises at an earlier period, for the demand had reference to a seizure actually made of seven beasts, when plaintiff had only a right to seize five. Supposing it then to be clear that the demand and refusal amounted to a conversion of five, still it is left uncertain which five he lawfully seized. If he is entitled to the best beast as a heriot, he must form a judgment and exercise an option as to which is the best. This is clear from the case quoted on the plaintiff's part

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from *Plowden*, 96, and *Cro. Eliz.* 32 and 589. The Court are of opinion that this objection must prevail, and the rule for entering a nonsuit must be made absolute on this ground.

Rule absolute.

G.

DARBY v. HARRIS and another.

Fixtures can-
 not be dis-
 trained for
 rent.

TRESPASS de bonis asportatis. Plea, not guilty by statute. At the trial before Lord Abinger C. B., at the spring assizes for the county of Surrey, the defendant, under the plea of the general issue, justified the taking of a distress for rent in arrear; but it appeared that part of the things distrained were fixtures, viz. a kitchen range, grates and a copper. The defendant had a verdict, with leave to the plaintiff to move to enter a verdict for 10*l.*, the value of the fixtures, on the ground that they were not liable to be taken as a distress.

Platt now shewed cause. There can be now no reason why fixtures, which the tenant would have a right to remove, should not be as much liable to distress as the furniture which is on the premises. They possess all the characteristics of personal estate, and there ought to be nothing in their being attached in a temporary manner to the freehold to exempt them from distress. The language of the earlier authorities is applicable only to a state of things where a distress was taken to compel the payment of rent, and the landlord had no right to sell the thing distrained, which was a mere pledge. Things distrained no longer possess that character, but a peculiar property in them is transferred by the distress to the landlord. After the five days, which must elapse before the things distrained can be sold, a complete dominion over them is transferred to the landlord. The ancient authorities make no difference be-

tween what is strictly part of the freehold and that which is a mere annexation to it for temporary purposes. Thus *Gilbert* (a), after stating that "whatever is part of the freehold cannot be distrained" because it cannot be restored in statu quo, adds, "Besides, what is fixed to the freehold is part of the thing demised, and the nature of the distress is not to resume part of the thing itself for the rent, but only the inducta and illata upon the soil or house. Hence it is that doors, windows, furnaces, &c. affixed to the freehold, are not distrainable." *Rex v. The Inhabitants of St. Dunstan's, Kent* (b), is an authority for saying that whether fixtures are or are not a parcel of the freehold, depends upon whether they are the property of the landlord or of the tenant. *Winn v. Ingilby* (c) is a very strong authority for the same proposition: it decided that fixtures cannot be taken in execution under a writ of fi. fa. where the freehold also is in the debtor. There can be no doubt they might have been taken if that had not been the case. *Hallen v. Runder* (d) decided that a contract for the sale of fixtures by the outgoing to the incoming tenant was not a sale of any interest in land.

C. Jones contra, after citing the cases of *Lee v. Risdon* (e) and *Pitt v. Shew* (f), and observing that at common law felony could not be committed of things attached to the freehold, was stopped by the Court.

Per CURIAM (g).—Fixtures cannot be distrained, because it is impossible to restore them in the same plight they were in when they were seized. In the case of *Duck v. Braddyl* (h) this point arose, but it was unnecessary to de-

(a) Distress, c. 1, § iii. Amos & Ferrard on Fixtures, 255.

(b) 4 B. & C. 691; S. C. 7 D. & R. 178.

(c) 5 B. & Ald. 625; S. C. 1 D. & R. 247.

(d) 1 C., M. & R. 200.

(e) 7 Taunt. 188.

(f) 4 B. & Ald. 206.

(g) Lord Denman C.J., *Patterson, Williams and Coleridge Js.*

(h) M'Clell, 217.

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side it. The law upon the authorities is clear, and we have no right to change it upon a suggestion that its present application is under circumstances which have in some degree changed.

G.

Rule absolute.

Monday,
 May 31st.

PINCHER v. HARVEY.

The interest which a bankrupt has in increasing the divisible fund under the fiat is sufficient to entitle him to set aside an execution, levied on his goods against good faith.

THIS was a rule calling on the plaintiff to shew cause why an execution, by *feri facias*, of a judgment entered up on a warrant of attorney, should not be set aside, as having been levied against good faith.

Erle shewed cause (a) on affidavits to the merits, which also disclosed that since the execution was levied the defendant had been declared a bankrupt. He contended that the defendant had no longer an interest in setting aside the execution, and was a mere volunteer.

Barstow contrâ. He has an interest in increasing the fund which is to be divided among the body of his creditors, and is also entitled to an allowance of money graduated on the scale of the dividend.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in the term (June 11), delivered the judgment of the Court.—This was a rule to set aside an execution upon a judgment entered up on a warrant of attorney, as having been levied against good faith. It was admitted that the warrant and the judgment could not be successfully impeached, and the Court, upon the facts, were of opinion that the defendant's affidavits, impeaching the execution, were not satisfactorily answered, but, as it appeared that a fiat had issued against the defend-

(a) Before Lord Denman C. J., *Patteson*, *Williams* and *Coleridge* Js.

ant, under which he was declared bankrupt, and which was in course of operation, a doubt was suggested whether the bankrupt had sufficient interest to entitle him to make the application. It is a clear and important principle, that a mere volunteer will not be heard to impeach transactions between third parties, and as in this case the debt, warrant and judgment, were unimpeached, and the discharge of the debt by the execution might enure to release the bankrupt from all danger of being taken on a ca. sa. hereafter, it might seem that his interest was rather to support the execution than to set it aside. But the Court will not be strict in examining the nature of the interest on which the party stands, if he appear to have any, nor in weighing the amount of it against any opposing interest. Now, in this case, it has been suggested truly that the bankrupt has an interest to increase the divisible fund and that as large a dividend as possible should be paid under the fiat. We think this sufficient. The rule therefore should be absolute.

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Rule absolute.

BINGHAM v. STANLEY.

Monday,
 May 31st.

ASSUMPSIT on a check for 500*l.*, drawn by the defendant on Messrs. *Wright & Co.*, payable to bearer, and delivered by him to one *Benjamin Lisle*, who transferred and delivered the same to the plaintiff. Second plea: that before the making of the said check, the defendant borrowed of the said *Lisle*, and *Lisle* lent to the defendant, in a common gambling room, 500 ivory counters, for the purpose, as *Lisle* well knew, of the defendant's illegally gaming at French hazard, contrary to the statute; and that for securing to the said *Lisle* the sum of 500*l.* (being the nominal amount and

Assumpsit against the drawer of a check. Plea, that it was drawn and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. Replication, that it was

delivered to the plaintiff for a good consideration. Issue thereon:—Held, that the illegal drawing of the check was so admitted on these pleadings, as to throw on the plaintiff the onus of proving the consideration.

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value of the said counters) for the said loan of the counters, the defendant made the check, and *Lisle* took and received the said check in respect of the said loan of the said counters, and on no other account whatsoever: that *Lisle* transferred and delivered the check to the plaintiff without any consideration whatever for so doing, and for the mere purpose of enabling the plaintiff to sue the defendant upon the check for the benefit of *Lisle*, and that there never was any consideration whatever for the plaintiff being the holder of the said check, but that the plaintiff holds the same and sues the defendant for the benefit and on the behalf of *Lisle*.
Verification.

Replication: that *Lisle* transferred and delivered the said check to the plaintiff, and the plaintiff took and received the same from *Lisle* for a good and sufficient consideration to the amount of the check, and that plaintiff held and holds the same for such consideration. Conclusion to the country, and issue thereon (a).

At the trial before Lord *Denman* C. J., in Middlesex, at the sittings after Hilary term, 1840, his lordship ruled, on the authority of *Edmunds v. Groves* (b), that on this state of the record the burden of proof was on the defendant. The defendant then began, and being unable to prove that the plaintiff gave no consideration for the check, the plaintiff had a verdict. In the following term, a rule nisi was granted for a new trial, on the ground of misdirection.

Sir *F. Pollock* and *S. Hughes* shewed cause (c) in this term. The question is, whether the plaintiff, by taking issue only on the consideration given by himself, has admit-

(a) The first plea stated the transaction between the defendant and *Lisle* in the same terms as contained in the second plea, but concluded by an averment that the plaintiff had full knowledge of the transaction when he took the draft, instead of the averment in the second plea, as to the want of con-

sideration. The first plea, however, is immaterial to the present question, as the defendant gave no evidence in support of it.

(b) 2 M. & W. 642.

(c) On a former day in this term, before Lord *Denman* C. J., *Patterson, Williams* and *Coleridge* Js.

ted the alleged illegality on which the check was founded, and thereby taken on himself the onus of proving, in the first instance, that he gave value for the check. *Edmunds v. Groves* (a) is a decisive authority to the contrary. There, to a declaration on a promissory note, the defendant pleaded that the note was given for a gaming debt, and indorsed to the plaintiff with notice and without consideration. The plaintiff replied that the note was indorsed to him without notice, and for a good consideration. Lord Abinger C. B. said, "I think it was incumbent on the defendant, who set up as a defence this fact, that the note came into the hands of the plaintiff with notice of its original infirmity, to have produced some evidence to prove it; or, in other words, that the *onus probandi* was on him." And, per Alderson B., "an admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but, if any inferences are to be drawn by the jury, they must have the facts from which such inferences are to be drawn, proved like any other facts." [*Patteson J.* That case is very distinguishable. The plea asserted affirmatively that the plaintiff had notice, and the defendant therefore took upon himself to prove that fact. Here the plea asserts negatively, that the plaintiff gave no consideration.] So did the plea in that case. [*Patteson J.* Yes, coupled with an affirmation of notice.] The plaintiff in effect replies, "I know nothing of the gaming you allege, but I deny that I gave no consideration for the check." The presumption of law is, that the holder of a negotiable instrument has given value. He may rest his title on that presumption until impeached. If the defendant pleads gaming inter alios without notice, and no consideration from the plaintiff, the latter in his replication may plead over to the gaming as an immaterial fact, so far as he is concerned, and narrow the issue to the question of consideration. On that issue his presumptive title is good until impeached by evidence at the

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trial. The gaming is not admitted on the record as a fact for the jury, or to vary the course of the trial. The plaintiff is not concluded by it. It is a fact protested, and not material to the issue. In *Bennion v. Davison* (a) it was held that traversing a material fact did not admit immaterial allegations not traversed. [*Coleridge J.* The question there was, whether the verdict was right. The course of the cause at nisi prius was not disputed. *Patteson J.* That case only establishes that taking issue on a material fact does not admit immaterial averments. The allegation of ownership of the vessel was immaterial; but here the gaming is the very foundation of this plea.] *Alderson B.* inclined to think that *material* averments were not admitted *as facts* to go to the jury. [*Patteson J.* A distinction seems to be made between admissions for the purposes of pleading and of proof, but I doubt if the distinction is sound.]

Erle and *E. V. Williams* contra. The ordinary presumption of law is, that the holder of a negotiable security has given value for it; but, if it is made to appear that the security was tainted in its origin with illegality or fraud, he must prove that he gave value. Formerly, the illegality was shewn under the general issue, *Heath v. Sansom* (b), but a special plea is now necessary. And the question here is, whether an admission, on the record, of the facts stated in the special plea, has not the same effect, in throwing proof of consideration on the plaintiff, as evidence under the general issue had. It is submitted that there is no distinction between a fact admitted on the record and a fact proved by evidence. "Every pleading is taken to confess such traversable matters alleged by the other side as it does not traverse;" *Steph.* Plead. 217 (c), and the authorities there cited. No evidence is required to prove a fact admitted on the record; *Cowlishaw v. Cheslyn* (d), *Frankum v. Lord Fal-*

(a) 3 M. & W. 179.

(b) 2 B. & Ad. 291.

(c) 3d ed.

(d) 1 Cr. & J. 48.

mouth (a), per *Patteson J.*; *Blewett v. Tregonning* (b). The opinion of Lord *Abinger C. B.*, in *Edmunds v. Groves* (c), is not inconsistent, he thought the affirmative of the issue, that the plaintiff had notice, was on the defendant. It is true *Alderson B.* said that an admission on the record is merely a waiver of proof of those parts of the record not denied, but that, if any inferences are to be drawn from those facts by the jury, they must be proved, but that opinion was extra-judicial. [*Patteson J.* If the admission waived the proof, why should the party be called upon to give evidence? *Coleridge J.* Is it contended that, if the defendant had been called upon to prove the gaming, the plaintiff could have contradicted the evidence? *Sir F. Pollock.* He might have shewn it to be false. *Coleridge J.* Then the whole plea is in issue. Is the judge or jury to try the fact; the former must determine the course of proceeding.] Formerly, unless a protestation was used, an admission by pleading over operated as an estoppel in a subsequent action; 1 *Roll. Abr.* 864, D. pl. 8, 10 *Vin.* 428 (Estoppel D), pl. 8. If it was an estoppel in a future action, why should it not operate as an admission in the present? Why is it a hardship, on the plaintiff, that he must sometimes take issue on one only of several allegations in the plea, unless the others are thereby admitted in that cause? In an action by villein against his lord, unless the latter makes protestation that he is his villein, the plaintiff is enfranchised; *Com. Dig.* (Plead.) N. Protestation. *Alderson B.* is reported to have said, "that the pleadings are not before the jury, but only the issue." In practice this is not so. In action by husband and wife, unless the marriage is denied by the plea, counsel in addressing the jury may treat the relation as an existing fact; or, on a new assignment extra viam, may comment on the existence of a road. But there are authorities to shew that an admission on the pleadings is available for the purposes of the cause; *Kinnersley v. Orpe* (d), per *Buller J.*, though

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(a) 2 A. & E. 456; S.C. 4 N. & M. 333.

(c) 2 M. & W. 642.

(b) 3 A. & E. 554; S.C. 5 N. & M. 308.

(d) 1 Dougl. 58.

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there was a protestando; and see *Gale v. Capern* (a), *Jacob v. Hungate* (b), *Perceval v. Frampton* (c), *Simpson v. Clarke* (d). In *Jones v. Brown* (e), Tindal C. J. said, "It is contended, on behalf of the plaintiff, that, having taken issue on a single allegation, he is not to be considered as having therefore admitted all the other allegations of the plea, and that the defendant ought to establish by proof the truth of those other allegations. I think, however, that this is not the result of such a state of the pleadings, but, on the contrary, that, as the plaintiff, who might have denied all the allegations, has singled out one only to be put in issue, he must be taken, for the purpose of this cause, to have admitted the rest." *Bosanquet J.* concurred in that opinion.

Cur. adv. vult.

LORD DENMAN C. J., at the sittings after this term (June 19), delivered the judgment of the Court.—The issue was raised on a plea to a declaration against the drawer of a check upon a banker, setting forth facts which would have made it illegal under the statutes of gaming, and concluding with an averment that plaintiff took the bill without a good consideration. The replication asserted that he took it for a good consideration.

It was necessary for me to decide at nisi prius on whom the burden of proof lies in such a state of the record. I thought it lay on defendant, who thereupon attempted to prove the gambling consideration, but gave no evidence that plaintiff took the bill without consideration. It followed, if my ruling was correct, that the plaintiff was entitled to a verdict.

A rule was obtained for a new trial. The first step in the argument was, that plaintiff, by taking issue on the consideration given by himself, admitted the illegal considera-

(a) 1 A. & E. 102; S. C. 3 N. & M. 863.

(b) 1 M. & Rob. 445.

(c) 2 C., M. & R. 180.

(d) 2 C., M. & R. 348.

(e) 1 B. N. C. 484.

tion on which the bill was said to be founded. This has led us to consider the doctrine more than once advanced in the Court of Exchequer, especially by my brother *Alderson*, in the cases of *Edmunds v. Groves* (a) and *Bennion v. Davison* (b), where he observed during the argument that "the pleadings are not before the jury, but only the issue," and gave judgment in substance, that "an admission on the record is merely a waiver of requiring proof of those parts of the record which are not denied, the party being content to rest his claim on the other facts in dispute; but, if any inferences are to be drawn by the jury, they must have the facts, from which such inferences are to be drawn, proved like any other facts."

Now both these cases are distinguishable from the present. In *Edmunds v. Groves* (a) the plea stated not only that the plaintiff took the bill without consideration, but that he knew of the illegality; and that knowledge was traversed by the replication. No doubt, according to all rules of pleading, whether in actions on bills of exchange or any other cause of action, where an affirmative allegation is made by the defendant, and denied, the onus of proving it is on him. The affirmative as to the plaintiff's knowledge was clearly alleged by the defendant, and therefore he was rightly put to prove that allegation at the trial. In the other case of *Bennion v. Davison* (b) the allegation in the declaration, which was decided not to be admitted by the plea, was an *immaterial* allegation, and the decision of the Court is put expressly on that ground, though my brother *Alderson* says, "that it must not be taken for granted that, if it had been material, there was an admission of it as a fact to go the jury."

Upon full consideration, we cannot agree with the doctrine thus stated. We think that an admission made in the course of pleading, whether in express terms or by omitting to traverse what has been before alleged, must be taken as an admission for all purposes of the cause, whether the facts relate to the parties or to third persons, provided the

(a) 2 M. & W. 642.

(b) 3 M. & W. 179.

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allegation so made be material. We find no authority to the contrary, and, indeed, in former times, before the new rules, such admission, in the absence of a protest, estopped the party, even in another cause, from disputing the fact so admitted.

The issue in this case was in its terms plainly affirmative on the part of the plaintiff, and the onus therefore lay on him. So it would if the plea had been to a declaration on a bill of exchange that the bill was accepted for the accommodation of the drawer, and indorsed by him to the plaintiff without consideration, and the plaintiff had replied that he gave consideration. The difference between the two cases is not as to the onus of proving the issue; in both it is on the plaintiff; the difference is as to the mode of proving the issue, and as to what shall be treated as sufficient proof by the plaintiff: and in this respect the rule remains as it was when the general issue was pleaded. In the case of an accommodation bill, the production of the bill is sufficient *prima facie* proof by the plaintiff: in the case of an illegal bill, or one on which suspicion of fraud is cast, the plaintiff must go further. Under the general issue, that illegality or that suspicion was shewn by evidence on the part of the defendant; now it is shewn by the defendant's allegations in his plea, if not denied by the plaintiff.

For my own part, I have felt some difficulty in coming to this conclusion, because it appeared to me that the course of practice had been the result of a kind of tacit convention at *nisi prius*, and that after the new rules were introduced, and the evidence was required to be pointed to specific issues, illegality of original consideration might be proved, without raising any inference of the want of consideration between the parties to the suit. I think, however, that 5 & 6 Will. 4, c. 41, may be considered as adopting the practice which had been known to prevail. And we are of opinion that the plaintiff ought in this case to have been put to prove that he gave consideration; and that the rule for a new trial must be made absolute.

Rule absolute,

1841.

*Saturday,
June 5th.*

The QUEEN v. The Inhabitants of CLINT.

ON appeal to the Michaelmas quarter sessions, 1840, for the West Riding of Yorkshire, against an order of the 24th June, 1840, for the removal of *John Lar*, his wife and children, from the township of Birstwith to the township of Clint, both in the West Riding, the sessions confirmed the order, subject to the opinion of this Court upon a case.

From the case it appeared that a former order for the removal of the pauper, his wife and children, from Birstwith to Clint, had been made on the 8th May, 1839, upon an examination of the pauper setting up a settlement in Clint by renting, &c. in that township, in 1827, and an occupation from June in that year to June, 1828. That order was appealed against, and the ground of appeal was, that the pauper did not bonâ fide rent or occupy, for a year from June, 1827, until June, 1828. On the hearing of this appeal at the summer quarter sessions for the West Riding, 1839, it appeared that the pauper entered upon the tenement in June, 1828, and not in 1827, as stated in his examination, and that he quitted in August, 1829. The sessions held the variance material, discharged the order, and refused to grant a case. This Court afterwards, in Trinity term, 1840 (*a*), discharged a rule for a mandamus to the justices to enter continuances and hear the appeal.

The second order of removal, now in question, was made upon an examination of the pauper, stating his occupation, agreeably to the dates proved at the trial of the former appeal, to have been from June, 1828, to August, 1829. The grounds of appeal against this second order of removal were the same (except that the dates were altered so as to meet the altered examination) in the second notice of appeal as in the first, with the addition of a new and distinct ground of appeal, as follows :

(*a*) The case (*Reg. v. Justices of West Riding*) is reported in 3 P. & D. 462.

Where the sessions have discharged an order of removal, as the ground of a material variance between the settlement stated in the pauper's examination and the settlement proved at the trial, the decision is upon the merits and final, so that a second order of removal cannot be made upon a second examination, stating the facts correctly.

Held, therefore, where an order of removal had been made upon a settlement by renting a tenement, as stated in the pauper's examination, from 1827 to 1828, and the sessions had discharged the order on its appearing that the renting was from 1828 to 1829, that a second order of removal could not be made upon another examination, stating the dates correctly.

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"That a former order made, &c. for removing the said *John Lax*, &c. from Birstwith aforesaid to Clint aforesaid, was discharged by the Court of Quarter Sessions, held at &c., on the 2d July, 1839, on an appeal prosecuted by the said township of Clint against such order of removal, and which said order related directly to the settlement of the said *John Lax*, &c. on the day of the date of the said former order of removal, *which is the same settlement now in question* between the parties to the present appeal, and it is therefore binding and conclusive between them, so far as respects the place of the last legal settlement of the said *John Lax*, his wife and children, it being admitted (a) in the copy of the examination of the said *John Lax*, sent to the said appellants along with the order of removal now appealed against, that the said *John Lax* has not done any act to gain a settlement subsequent to the date of the said former order of removal."

The question for the opinion of this Court was, whether the discharging of the former order of removal, under the circumstances above stated, was conclusive between the parties on the second appeal, so as to preclude the respondents from removing the pauper again upon a fresh order, founded upon a new and correct examination.

If this Court should be of opinion that it was conclusive, then the second order of removal, and the order of sessions confirming the same, are to be discharged.

Wortley, in support of the order of sessions. The judgment of the sessions, at the time of the former appeal, is conclusive only upon the question then decided: *Rex v. Wick*, *St. Lawrence* (b), *Rex v. Osgathorpe* (c). The settlement, on which the second order of removal is made, is not the same with that on which the first was made; the

(a) The admission referred to was an admission implied from the absence of any allegation of a subsequent settlement.

(b) 5 B. & Ad. 526; S. C. 2 N. & M. 289.

(c) Burr. S. C. 261.

question therefore raised on the second appeal, could not have been decided by the sessions on the former appeal.

Secondly, an order of sessions, discharging an order of removal, is not final, unless made upon the merits: *Rex v. Wick, St. Lawrence* (a), which was recognised in *Rex v. Church Knowle* (b). The merits of this case were wholly untried upon the former occasion, and the case went off upon a technicality which precluded the respondents from going into the question in issue. [*Coleridge J.* The question was not as to the settlement of the pauper generally, but as to the settlement *alleged*. Did not the sessions decide upon the merits when they decided the whole question, which was, whether the pauper had the settlement *alleged*?] The settlement now alleged has never been adjudicated on. The sessions would not allow the respondents to enter upon it, because it was misdescribed, in the examination, perhaps by a mere slip of the pen. The respondents have been nonsuited, and are entitled to try again. The informality by which they were defeated was like an informality in the notice of appeal, or any other informality which prevents a party from going into his case. [*Coleridge J.* You did go into your case, and the sessions decided that you had failed to prove it. We must now assume the variance to have been material. *Patteson J.* You might as well say the decision would not have been upon the merits if you had set up in the examination a settlement by hiring and service, and had sought to prove nothing but a settlement by estate.]

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R. Hall and Pickering, contra, were not heard.

LORD DENMAN C. J.—The 4 & 5 Will. 4, c. 76, has made a great difference as to such points. A party must send notice of the actual settlement on which he relies, and if he does not, whether by mistake or not, his adversary has a right to bind him, and shut him out from proving any

(a) 5 B. & Ad. 526; S. C. 2 N. & M. 289.

(b) 7 A. & E. 471; S. C. 2 N. & P. 359.

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other settlement. This may be said to be a hard rule; but I think it promotes justice to keep parties to the issue, and not allow them to set themselves right at any future time.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

D.

Order of Sessions quashed.

Thursday,
June 3.

Where the trustees of a turnpike road have formed a new road through private grounds, but have neglected to make proper fences, as required by stat. 4 Geo. 4, c. 95, s. 66, the want of the necessary funds for that purpose is not a sufficient answer to a mandamus commanding them to make the fences.

The QUEEN, on the Prosecution of SAMUEL CRAWLEY,
 v. The Trustees of the LUTON ROADS.

THE defendants had obtained a rule nisi to set aside a peremptory writ of mandamus issued by the prosecutor in this case, under the following circumstances. In Michaelmas term, 1839, a mandamus had issued to the defendants, at the instance of the prosecutor, which recited the 4 Geo. 4, c. 95, s. 66 (a), and suggested that they had diverted and altered the course of a certain part of a turnpike road, of which they were trustees, between the town of Luton and the village of Barton in the Clay, in the county of Bedford, "and had made a new road upon, in, through, and over certain closes or pieces of land situate in the parish of Luton, belonging to the prosecutor (describing them); that the prosecutor had required the defendants to make and plant, or cause to be made and planted, proper quickset hedges, and to make or build proper fences or walls on both sides of the said parts of such new made road with sufficient ditches," which they had refused and neglected to do. The writ then commanded the defendants to make the hedges and fences or walls as required in pursuance of the statute.

(a) That in all cases where the trustees or commissioners of any turnpike road shall turn or alter any part or parts of such turnpike road, or make any new road over and through any private grounds, or across any public or private

footway &c., such trustees or commissioners shall make, or cause to be made and planted, proper quickset hedges, or shall make or build proper fences or walls on both sides of such new made road, &c. with sufficient ditches &c.

The defendants made return, 1st. Denying that the closes mentioned in the writ were at the issuing of it the private grounds or private ground of the said *S. Crawley* within the meaning of the statute. 2dly. That before making the said diversion and new road, to wit, on the 29th March, 1830, the defendants and the prosecutor had appointed a surveyor to assess the sum of money which the defendants ought to pay to the said *Samuel Crawley* for so much of the said closes as they might require to take for the diversion and for making of the said new road over the same, and for the damage which he might sustain by reason of the said intended diversion and alteration, and the making of the said new road upon and over the same in anywise whatsoever. That the said surveyor in 1832 assessed the sum at 379*l.* 10*s.* for and in respect of the right and interest of the said *Samuel Crawley* to and in so much of the said closes as the defendants should require and take, and for the damage which he might sustain as aforesaid; and that defendants therefore executed a mortgage of the tolls for 420*l.* to the said *Samuel Crawley*, who accepted and received the same for and in respect of the matters in that behalf aforesaid. 3dly. That the defendants had not nor had any person in their behalf, at the date of the said writ, and at the time when the said *Samuel Crawley* required them to make and plant the said hedges and fences or walls with ditches, as in the writ mentioned, nor have they now any funds, monies, or property whatsoever in their hands, possession, power, custody, and control, whereby they can or at the several times aforesaid could make or cause to be made and planted proper quickset hedges, or make or build proper fences or walls on both sides of the said new made road or any part thereof in the writ mentioned, so as effectually to guard and fence off the said lands, or any or either of them or any part thereof from trespass and injury, but that on the contrary the said defendants, as trustees as aforesaid, now are and at the date of the said writ and at the time of the said request, were

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indebted to divers persons in the sum of 10,000*l.* and upwards, which they were and still are unable to pay and satisfy, and which said sum was raised and borrowed by virtue of several acts of parliament.

The prosecutor, protesting that the return and the matters therein contained were insufficient in law to bar the peremptory writ, traversed the allegation that the said closes were not his private grounds within the meaning of the statute, on which issue was joined. The issue was tried at the Bedford summer assizes, 1840, and the jury found a verdict for the plaintiff. In the ensuing term a rule for the peremptory writ was granted, and the defendants obtained this rule to set it aside.

Sir *J. Campbell* A. G. and *Byles* now shewed cause. By stat. 9 *Ann.* c. 20, s. 2, the prosecutor "may plead to or traverse *all or any the material facts*" contained in the return, and if a verdict shall be found for him, a peremptory writ for him shall be granted without delay. Here the prosecutor has succeeded on the only material issue raised on the return. It will be contended that the alleged compensation for the value of the land and "damage" caused by making the new road was accepted in lieu of all further acts to be done by the defendants; but the compensation was made under the 3 *Geo.* 4, c. 126, s. 84, for damage contemplated by that act, which did not include the repair of fences. The stat. 4 *Geo.* 4, c. 95, s. 66, enacts, that in all cases where the trustees shall make a new road through any private grounds they *shall make* and plant proper fences. Again, the erection of them being an imperative duty, a return that the trustees had not nor have the necessary funds for that purpose is as insufficient and immaterial a return, in point of law, to this writ, as to a mandamus for payment of the purchase money for the land.

Gunning contrà. The return contained three material allegations in answer to the writ, and the prosecutor tra-

versed one only. Although he succeeded on this issue, he has not thereby shewn the return generally to be insufficient or falsified. If the alleged compensation did not include the expense of new fences, he ought to have traversed that part of the return and raised that question. Nor has he traversed the want of funds. He cannot therefore be entitled to this writ under the statute 9 *Ann.* c. 20. The grant of a mandamus is an act of a discretionary nature; *Bac. Abr. Mandamus* (E), *Rex v. Owen* (a); and when public officers discharging a public duty, without any personal liability, plead a want of funds, the Court will look whether the prosecutor, by his acquiescence for a long period in the state of facts alleged in this return, has not disentitled himself to this writ.

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Sir *J. Campbell* A. G. replied.

LORD DENMAN C. J.—It seems to me that the want of funds is not, in point of law, an answer to this writ. Though the duty which the defendants had to discharge was a public duty, it does not appear on the return why they are without funds, or how they have disposed of them.

PATTESON J.—When the trustees made the new road they were bound by the statute to make proper fences. If they had not the funds to do both, they should have done neither.

WILLIAMS J. concurred.

COLERIDGE J.—It was as much the duty of the trustees to make proper fences as to make the road.

Rule discharged (b).

(a) *Skin.* 669.

(b) As to the sufficiency of a return, that a company has not the funds necessary for the discharge

of a public duty, see *Reg. v. The Eastern Counties Railway Company*, 4 P. & D. 46.

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Wednesday,
May 26th.

Debt will lie for use and occupation, though there be an express demise, if it be not by deed.

GIBSON v. KIRK.

DEBT for use and occupation. At the trial before *Al-der*son B. at the spring assizes for Northumberland, 1839, it appeared that the defendant was tenant to the plaintiff of certain premises at 26*l.* per annum, under a demise by the plaintiff, not under seal, bearing date Oct. 8, 1837. The tenancy was to commence on the 11th November then next. By force of this demise the defendant held the premises, and it was for the occupation under it that the action was brought. It was objected, on the part of the defendant, that debt would not lie for use and occupation, where there was an express demise. The learned judge overruled the objection, and the plaintiff had a verdict.

Matthews obtained a rule to shew cause why a new trial should not be had. He contended that where it appeared that the occupation was under an express demise the declaration was not supported, inasmuch as it alleged an enjoyment by permission of the plaintiff, and the proof was, that by the demise the estate was out of him and in the tenant who enjoyed in right of his own estate as tenant: that this objection would apply equally to assumpsit for use and occupation but for the statute 11 *Geo. 2*, c. 19, s. 14, which enacted in express terms that the proof of a demise not under seal should not nonsuit the plaintiff. He also referred to this enactment to shew that before it no action for use and occupation could be maintained in the case of an express demise, for, if it could, that statute was unnecessary.


Alexander and *W. H. Watson* shewed cause (a).

Matthews supported the rule.

Cur. adv. vult.

(a) In Hil. term, Jan. 14th, before Lord Denman C. J. *Little*dale, *Patterson*, and *Coleridge* Js.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action of debt for use and occupation. Plea, *nunquam indebitatus*. On the trial it appeared that the defendant held under a lease, not under seal, dated October 8th, 1837, whereby “the plaintiff agreed to let and the defendant to take the premises at 26*l.* per annum, the tenancy to commence on the 11th November then next.” The learned judge was asked to nonsuit, but refused, and directed a verdict for the plaintiff.

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We are now asked to set this verdict aside, upon the ground that the action is misconceived, that although a count in debt for rent would be good under the circumstances, yet that a count in debt for *use and occupation* is not good, as soon as it appears that there is a demise at a certain rent.

The objection is one of a strictly technical nature, but the defendant is not on that account less at liberty to take it, and, if it be found tenable, the plaintiff is in no way aggrieved, for he might have framed his count, without any difficulty, so as to be free from all objection.

The action of debt for use and occupation (as well as that of *indebitatus assumpsit* for the same) is quite of modern introduction. The learned counsel for the defendant conceded upon the argument that such action would lie at common law, where there is no demise at a certain rent, and probably upon principle it would lie, but no instance of it is to be found in any of the old entries. The first notice of such an action is in *Stroud v. Rogers* (a), cited and relied on in *Wilkins v. Wingate* (b), and again in *King v. Fraser* (c). Since those cases the action has become very common, and has certainly been resorted to wherever the demise has not been by deed, without regard to the distinction now taken between mere occupation by permission for reasonable remuneration, and demises for a certain time at a certain rent. Actions of *indebitatus assumpsit* for

(a) Hil. 32 *Geo.* 3.

(c) 6 East, 348.

(b) 6 Term Rep. 62.

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use and occupation have also been constantly brought whether there has been a certain term and a certain rent or not, but that action is protected, by statute 11 Geo. 2, c. 19, s. 14, from being defeated by proof of a certain rent under a parol demise or agreement not under seal, whereas the action of debt is not mentioned in that statute, but only an action on the *case*, and, in *Egler v. Marsden* (a), Mr. Justice Gibbs expressly states that the action of *debt* for use and occupation is not under 11 Geo. 2. Before that statute actions of *assumpsit* for the occupation of land had frequently been held maintainable, notwithstanding the objection that rent sounded in the realty and could not be the subject of a mere personal action, the Courts apparently treating the contracts between the parties as agreements, and not leases, and so not concerning the *realty* whenever they held the actions maintainable, and holding the action not maintainable, whenever they could not shut their eyes to an actual lease, as in the case of *Brett v. Read* (b), which was *indebitatus assumpsit for rent arrear*, and was held bad on that account. The principal cases are collected in the note to *Beverley v. Lincoln Gas Company* (c). The Court in that case observed, that the action for use and occupation is *established* by stat. 11 Geo. 2, which expression must not be taken as meaning that it was *introduced* by that act, but only that it was *established* even in cases where there was an express demise at a certain rent, if not under seal. Yet no instances of *indebitatus assumpsit* for use and occupation will be found before that act; nor any founded upon a quantum meruit; they are all for some fixed sum. So *debt for rent* was at all times maintainable whenever the demise was by deed, or by writing not under seal, or by word of mouth, both which latter are of course included in the expression "parol demise," so frequently found in our books. The entries are numerous in *Rastall*, *Clift* and *Thompson*, and in *Saunders* and other books. But they

(a) 5 Taunt. 25.

(c) 6 Ad. & E. 839; S. C. 2 N.

(b) Cro. Ca. 343; Sir W. Jones, & P. 283.

one and all contain the word "demised," and shew the rent in certain, though when the demise was by deed no profert is made, and frequently no statement of the existence of a deed, it being considered as a mere inducement to the action. No instance is to be found among them of an action of debt for a *reasonable* remuneration for the occupation of land. The truth is that the occupation of land by a person bound to pay some remuneration for it, without the amount or time of payment being fixed, was and is now of rare occurrence. When it does occur, the implied contract is raised by law from the fact that land belonging to the plaintiff has been occupied by the defendant by the plaintiff's permission—the obligation is co-extensive with and measured by the enjoyment—as soon as the occupation ceases, the implied contract ceases, and, as no express time is limited, the remuneration must necessarily accrue from day to day. This state of things is *primâ facie* supposed to exist in all actions for use and occupation, at least so far as regards time of payment, therefore it is held that in debt for use and occupation it is not necessary to state the particulars of the holding: *Wilkins v. Wingate* (a), *King v. Fraser* (b), *Davies v. Edwards* (c); and, in such action for the use and occupation of a house which has been burned down, the plaintiff may recover up to the time of the fire, as was held by this Court in Easter term last in the case of *Packer v. Gibbins* (d), in which case the defendant could only have prevented the plaintiff from so recovering by setting up that he was tenant for a certain time, and then he would have been liable for rent *after* the fire until that time had elapsed. The action of debt for use and occupation was wanted only where the occupation was for no certain time at no fixed rent, for in all other cases the action of debt for rent was the known and appropriate remedy. Yet it does not appear to have been introduced to meet such cases, for in *Stroud v. Rogers* (e) and *Wilkins v. Wingate* (a) there was

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(a) 6 T. R. 62.

(d) *Ante*, 10.

(b) 6 East, 348.

(e) 6 T. R. 63, n.

(c) 3 Mau. & S. 380.

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a demise for a certain time at a certain rent. It is true that both these cases arose on demurrer to the count for use and occupation, in which no such demise was stated, but in both of them there were counts for rent, and it is pretty clear that if the defendants had pleaded nil debet the same point would have arisen as is raised in the present case. *King v. Fraser* (a) and *Davies v. Edwards* (b) were also on demurrer. But, upon the argument of the former, it was assumed throughout that there was a demise, which might have been stated with particularity, and the Court in their judgment do not put the case at all upon the ground that possibly there was no demise for a time certain at a certain rent, and so the count might be free from all the objections urged. On the contrary, Lord *Ellenborough* says, "As to the inconveniences to the tenant which are pointed out by the causes of demurrer alleged, they may be gotten rid of by calling for particulars of the plaintiff's demand, or, if another action for *rent* be brought, he may by proper averments in his plea shew that the plaintiff had before recovered the same rent in an action for use and occupation of the same premises." What is this but saying in direct terms that debt for use and occupation will lie where debt for *rent* will also lie? *Egler v. Marsden* (c), which was eight years later than *King v. Fraser* (a), was after verdict on nil debet, and objection was taken that debt for use and occupation in that general form would not lie, and the objection was overruled; but it was not suggested that there was no demise, and therefore an action for use and occupation was the only remedy, which would have been a ready answer if the facts had been so.

Since that, the very recent case of *Wilkinson v. Hall* (d) has been determined, in which, after a trial where a written agreement amounting to a lease not under seal was given in evidence, the Court directed the verdict to be entered on the third count, which was in debt for use and occupa-

(a) 6 East, 348.

(b) 3 Mau. & S. 380.

(c) 5 Taunt. 25.

(d) 3 Bing. N. C. 508; S. C. 4 Scott, 301.

tion in the general form. It is true that the objection now raised was not taken, the case therefore goes no further than shewing the prevailing notion, that debt for use and occupation will lie notwithstanding the existence of a written lease not under seal.

But it is asked, what is the difference between the actions of debt for use and occupation, and of indebitatus assumpsit for the same, and if the latter, but for the operation of the stat. 11 *Geo. 2*, would be defeated by proof of a written demise, although not under seal, why should not the former, to which the statute does not apply, be defeated by similar proof? One answer may be, that the action of assumpsit was always looked upon not only as a personal action, which the action of debt equally is, but as one wholly inapplicable to realty or matter arising out of it, as rent is, whereas the action of debt was always applicable to rent and some other matters connected with realty. The action of debt was always treated as of a higher nature than assumpsit; it will lie on records and specialties, where assumpsit will not, and though it be true that wherever indebitatus assumpsit will lie debt will lie (with the exception of the present action if it be one), the converse is not true. It may therefore be proper to apply different rules to an action of debt even upon simple contract, from those which are applicable to indebitatus assumpsit. But another answer is, that although the stat. 11 *Geo. 2*, c. 19, s. 14, recites "that some difficulties many times occur in the recovery of rents where the demises are not by deed," and makes provision only for an action on the case, protecting the plaintiff from being nonsuited "in such action, if any parol demise or any agreement (not under seal) whereon a certain rent is reserved shall appear," it by no means follows that previous to that statute a nonsuit must have taken place under similar circumstances in an action of debt for use and occupation. No instances of such actions before the statute are recorded, but, as soon as they were brought after the statute, they received the construc-

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tion which has already been noticed, and which they might have received, if brought before the statute, without violating any rules of law.

The objection is, as was at first stated, purely a technical and formal one, and, when the Courts once established that debt for use and occupation would lie, no sound reason can be assigned why it should not be applied to all cases of demises not under seal, as it undoubtedly has been for a long series of years. For these reasons we are of opinion that the direction of the learned judge in this case was correct, and that the rule for a new trial must be discharged.

G.

Rule discharged.

Thursday,
 May 27th.

SCOTT v. PARKER.

Plaintiff lent defendant money, and received from defendant shares in a company as a security, and agreed to give twenty-one days notice to defendant before proceeding to compel the repayment of the loan, or of any part thereof, and, upon repayment of any part of the loan, to give back a proportionate amount of shares:—Held that after twenty-one days the plaintiff was not bound to declare specially, averring a tender of the shares, but that he might declare in indebitatus assumpsit for money lent.

ASSUMPSIT. The declaration contained only the common count for money lent, to which the defendant pleaded the general issue. On the trial, at the sittings for Middlesex after Michaelmas term, 1839, before Lord Denman C. J. the plaintiff produced in evidence the following document :

" 24th October, 1838.

" I acknowledge having received of Mr. *Richard Parker* (the defendant) eighty shares in the Commercial Inland Carrying and Steam Navigation Company, indorsed as 7*l.* paid on each share, forty granted to Mr. *Richard Wall*, and forty to Mr. *Richard Parker*, both of whom have signed transfer notes in my favour. And whereas I have this day advanced and lent to Mr. *R. Parker* 200*l.*, and also discounted various bills of exchange accepted or indorsed by him, it is hereby agreed, that the said shares shall remain as a security for the above-named sum, and for all further sums that may hereafter be advanced by me, and also for all bills bearing his acceptance or indorsement which I have or may hereafter discount or advance money upon. And I further agree to give Mr. *R. Parker* twenty-one days' notice in writing before I proceed to compel him to pay the money advanced, or any portion thereof, and that upon each payment a proportionate amount of shares shall be given up and transferred to him or his order.

" (Signed) *John Scott*, (Plaintiff),
Richard Parker."

A twenty-one days' notice was proved. It was objected, on the part of the defendant, that this document was not evidence in support of the declaration, and that, instead of the common count for money lent, the plaintiff ought to have declared on the special agreement, averring a tender of the shares. *Jones v. Barkley* (a) and *Rawson v. Johnson* (b) were cited. This objection was overruled, but leave was given to the defendant to move to enter a nonsuit on the objection made at the trial. A verdict being found for the plaintiff, a rule nisi was obtained accordingly.

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Sir *F. Pollock* and *Barstow* now shewed cause. It will not be contended that the mere deposit of the shares as a pledge would compel the plaintiff to declare specially. Then do the terms of the agreement preclude the use of the common count? The rule on this subject is thus stated by *Tindal C. J.* in *Grissell v. Robinson* (c), which was an action for money paid, "I have always understood the distinction as to the obligation to sue on the special contract rather than on the general count to be, that, where at the time of payment any thing remains to be done under the contract of which the plaintiff must shew performance, the action should be on the special contract; but where all has been done, and the plaintiff has only to prove the payment of the money, then he may sue on the general count." The same rule was adopted in *Lucas v. Godwin* (d) and *Johnson v. Kirk lady* (e). In this agreement the transfer of the shares is made to follow and not to precede payment.

Erle contra. The doctrine laid down by *Tindal C. J.* is not disputed, but this case falls within the exception. The transfer of the shares is, by this agreement, to be either a condition precedent to, or a concurrent act with, the demand of repayment of the loan. In *Phillips v. Fielding* (f),

(a) Doug. 684.

(b) 1 East, 203.

(c) 3 B. N. C. 10; S. C. 3 Scott,

(d) 3 B. N. C. 737; 4 Sc. 502.

(e) 1 Arn. & Hod. 7.

(f) 2 H. Bl. 123.

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where the purchase money for an estate was to be paid at a certain time on having a good title, and a proper *surrender to be made on payment*, it was held that the vendor could not sue for breach of this agreement, without averring that he *had* made a good title, and *had* surrendered. And in *Spiller v. Westlake* (a) Lord Tenterden said, "Where by one and the same instrument a sum of money is agreed to be paid by one party, and a conveyance of an estate to be at the same time executed by the other, the payment of the money and the execution of the conveyance may very properly be considered concurrent acts, and in that case no action can be maintained by the vendor to recover, until he executes or offers to execute a conveyance." [*Coleridge J.* If *A.* lends money to *B.* on a deposit of deeds, must *A.* give up the deeds before he can recover on the common count?] He must tender them on demanding payment. If payment is conditional, no right of action vests until performance of the condition. In an action for goods sold, a plea that they were sold on condition amounts to the general issue.

PATTERSON J.—The whole question in this case, which depends entirely on the construction of the agreement, is, whether the giving up by the plaintiff of the shares deposited with him is made by that instrument a condition precedent to, or a concurrent act with, his demand of repayment of the monies advanced. If it was either the one or the other, he was bound at the trial to shew performance of it, and there was no evidence of any tender of the shares. It is admitted that giving notice was a condition precedent, but that was done; and, after performance, if it was the only condition, the plaintiff might adopt the general count. Was there, then, anything else in this agreement which remained to be performed by him, because, if there was, he ought to have declared in a special form on the instrument? The parties appear to know the use of words. The plaintiff

(a) 2 B. & Ad. 155.

agrees to give twenty days' notice in writing before he will proceed to compel payment of the whole or part of the monies advanced, but says nothing about any tender of the shares: but he adds, that "upon each payment" he will give up and transfer a proportionate amount of shares. I think that the word "upon" (*a*) is clearly to be read in the sense of "after," and that it neither makes the transfer a condition precedent, nor a concurrent act. It follows therefore that the plaintiff may recover on the general count for money lent. The defendant, on payment or tender of the monies and refusal, might have brought trover for the shares, but there was no obligation on the plaintiff to tender them before action.

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WILLIAMS J.—I am of the same opinion. The shares were deposited with the plaintiff as a security, and redelivery was to be made "upon payment" only. In other words, payment was the first act to be done, and the redelivery was to follow. After notice given, and the expiration of it, a special count was unnecessary. The case resembles the ordinary one of goods sold and delivered on credit; the vendor, when the credit is expired, that is, when nothing on his part remains to be done, may declare in the common form for goods sold and delivered.

COLERIDGE J. and Lord DENMAN C.J. concurred.

Rule discharged.

(*a*) As to the meaning of the word "upon," see *Reg. v. Humphry*, 3 N. & P. 681; and *S.C.* in error, 2 P. & D. 691.

The QUEEN *v.* The Inhabitants of ALTERNUN (*b*).

ON appeal against the removal of *Catherine Bray*, and three of the children of *Thomas Bray*, from the parish of

(*b*) Decided in Hilary term last, January 27th.

the only witness upon whose examination the order of removal was made was a convicted felon, it not appearing that the justices making the order knew that fact. *Quære*, whether the justices were not bound to make the order on his testimony, unless the incompetency were proved at the time, by production of the record of the judgment against him.

It is no objection on appeal against the removal of a pauper that

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Gwennap, in the county of Cornwall, to the parish of Alternun, in the same county, the sessions confirmed the order, subject to the opinion of this Court on a case, which stated that the only examination which accompanied the order of removal, and which related to the chargeability, was the examination of *Thomas Bray*, the father of the paupers, who was described in the examination as a prisoner in the gaol at Bodmin. The case stated the several grounds of appeal, which appeared in the notice of appeal, the last of which was, "because the said examination of the said *Thomas Bray*, on which the said order was made, is insufficient, illegal, and without effect, and ought not to have been taken by the same justices, the said *Thomas Bray*, at the time of the taking thereof, being a convicted felon in the said gaol of Bodmin in the said county of Cornwall, and now suffering his punishment there."

The appellants in support of this objection tendered in evidence the record of *Bray's* conviction. The sessions rejected this evidence, and confirmed the order.

If the rejection were right, the order of removal and order of sessions to be confirmed; if not, to be quashed, and the appeal re-heard.

Sir *W. W. Follett* and *M. Smith* in support of the order of sessions. The only objection to the examination was to the competency of one *Bray* as a witness, and that was not taken at the time, nor is it stated that it was known to the magistrates. [*Coleridge J.* Suppose the objection were that the examination was not upon oath.] That is not the present case, and it differs from it, because the magistrate must have known of a violation of the first rules of evidence. At nisi prius this case occurs every day. There could be no objection to the evidence of a convicted felon, if it were not made when the evidence was given. [*Cole-ridge J.* Suppose all the evidence stated in the examination to have been hearsay.] That again would have been an objection that must have been known to the magistrate. It

may, however, be doubted whether it could be any objection to an order of removal, that it was founded on hearsay evidence. It would be most inconvenient to decide that every fact inquired into in this preliminary stage must be proved according to the strict rules of law. The order may be supported by other evidence than that originally given. The examination itself would not be evidence, and, if it were attempted to call the pauper upon the trial of the appeal, the objection might then be properly taken.

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Bere contrà. The case of *Reg. v. Middleton in Teesdale* (a) decided that the examination must shew every material fact necessary to give jurisdiction to the justices to remove. If part of the examination was legal, it would be good pro tanto, but, if insufficient without the rest of it, the order of removal would be invalid. In *Rex v. Luffe* (b), where an order of bastardy had been made partly on evidence of a married woman, it was supported on the presumption that non access was proved by the other evidence, or that, if she also gave evidence of it, the judgment of the justices making the order was not founded upon it. Supposing there were no examination at all, it might certainly be objected that there was no jurisdiction to remove. It is a fatal objection, on appeal, that chargeability does not appear on the examination; *Reg. v. Black Callerton* (c). The law was the same before the stat. 4 & 5 Will. 4, c. 76, *Rex v. Coln St. Aldwins* (d). In *Rex v. Justices of Norfolk* (e) an order was abandoned because it was made upon the evidence of a convicted felon. [Lord Denman C. J. That was not the point in that case.]

LORD DENMAN C. J.—My first impression was certainly opposite to that I have now formed. I think the justices were bound to take the examination of the witness, though


(a) 3 P. & D. 471.

(d) Burr. S. C. 136.

(b) 8 East, 193.

(e) 5 B. & Ald. 484.

(c) 2 P. & D. 475.

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a prisoner at the time, unless it was brought to their knowledge that he was then a felon convict. He might have been a prisoner without being a convicted felon, and the fact that he was so ought not to invalidate the examination, unless it appear, which is no where found in the case, that the justices knew the fact. Our decision is not at variance with the cases of *Reg. v. Bluck Callerton (a)* and *Reg. v. Middleton in Teesdale (b)*, which were both cases of examinations defective on the face of them, the former shewing no chargeability, the latter no settlement whatever, and therefore nothing to shew the jurisdiction of the justices to make the order. Here every thing is shewn necessary to give the justices jurisdiction, and they were bound to make the order. If the witness had been called at the sessions, a valid objection to his competency might certainly have been made. *Reg. v. The Justices of Norfolk (c)* was decided on another question, the right of the sessions to refuse to enter an appeal when the order had been superseded with the consent of the removing parish.

LITLEDALE J.—The fact of the witness being in prison might have suggested to the justices to make an inquiry whether he were a convicted felon or not, but it does not appear in the case that they made such an inquiry, or were in any manner made acquainted with the fact. The examination is perfect as far as it went, and the case is the same as it would be if the justices had proceeded on the testimony of persons, who, it was afterwards found out, were interested.

PATTESON J.—The case does not state that the magistrates knew of the conviction, nor do the appellants state that they did, in their grounds of appeal. The examination is good on the face of it: though it states the witness to be then in gaol, he might have been merely com-

(a) 2 P. & D. 475. (b) 3 P. & D. 473. (c) 5 B. & Ald. 484.

mitted to take his trial. *Reg. v. Black Callerton*(a) is a different case, the examination omitted a fact material and necessary to give the justices jurisdiction. I think proving at the sessions that the witness was a convicted felon is not enough, it must be shewn that the magistrates knew it.

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COLERIDGE J.—I think this case stands clear of all the decided cases. The examination states enough to shew the jurisdiction. The chargeability and all the requisite facts appear upon the face of it. The general presumption is in favour of the competency, and the incompetency must be proved. Unless clear proof was given of the conviction and judgment, the witness was competent at the time this examination was taken. The case is like that put by my brother *Littledale* of the examination of an interested witness.

Order of Sessions confirmed.

G.

(a) 2 P. & D. 475.

The QUEEN v. The Inhabitants of BRIDGEWATER (b).

THIS was an appeal against an order for the removal of *Henry Channon*, his wife, and their children from Bridgewater to Compton Bishop, in the county of Somerset.

The order was appealed against by Compton Bishop, and the grounds of appeal were stated as follows.

“The grounds of such our appeal are, that the said *Henry Channon* has never been maintained by our parish of Compton Bishop, but that he has resided in and obtained a settlement in your parish of Bridgewater by servitude therein, the said *Henry Channon* having been the hired servant of *Charles Knight*, of Bridgewater aforesaid, sheriff’s officer, for a period exceeding one year, and has not, since such servitude, obtained a settlement in our said parish, and that the said *Henry Channon* was, by such service as aforesaid, and now is legally settled in the said parish of Bridgewater.”

On an appeal, the statement of the grounds of it gave the name of the master under whom it alleged a subsequent settlement in another parish by hiring and service had been obtained, but omitted to mention the date of the service, and gave no reason for the omission. Held, that the statement was therefore insufficient.

(b) Decided in Hilary term last, (Jan. 20th.)

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At the trial of the appeal it was objected, on the part of the respondents, that the notice of appeal was insufficient for not stating the date of the service of the pauper with *Charles Knight*. The Court were of opinion that the objection was valid, but proceeded to try the case upon the merits, and decided that the pauper gained a settlement in Bridgewater by hiring and service for fifteen months, in the years 1825 and 1826, and the order was quashed, subject to the opinion of this Court as to the sufficiency of the notice of appeal upon the above-mentioned point.

If the Court should be of opinion that the grounds of appeal contained in the notice above set forth were sufficiently stated according to the provisions of 4 & 5 Will. 4, c. 76, s. 81, the order of removal was to be quashed, but if the Court should be of opinion that the notice was not sufficient, then the order to be confirmed.

Cockburn and *T. W. Saunders* in support of the order of sessions. The statement of the ground of appeal was sufficient: it furnishes the name of the person under whom was the servitude which it was intended to rely on as giving a settlement in another parish, and sufficient was done to put the respondents in a train of inquiry, and enable them to meet the case which the appellants proved at the sessions. The case of *Rex v. The Justices of Derbyshire* (a) is rather an authority in favor of the appellants than against them, for there neither the period at which the service took place, nor the name of the person under whom it was, were set out in the notice of appeal, and the Court said, neither appearing, the notice was bad, as in a populous parish, on receiving such a notice, the respondents would, probably, in vain make inquiries as to the fact of the pauper having been hired and having served in it. In the case of *Rex v. Kelvedon* (b) it was considered much greater particularity was required in stating the

(a) 6 A. & E. 890; S. C. 1 N. & P. 139.

(b) 5 A. & E. 687; S. C. 1 N. & P. 703.

grounds of appeal, than in the examination of the pauper previous to his removal. But that distinction has not been supported by later authorities. *Reg. v. The Justices of the West Riding of Yorkshire* (a). The case of *Reg. v. Misterton* (b) is also at variance with the rule. In *Reg. v. The Justices of Sussex* (c) the name of the master under whom the pauper served was not given. If this had been the case of the examination of a pauper, would it not have been sufficient without stating the time of the service, which a pauper might not be able to remember? The time of the service is not essential. [Coleridge J. It might be extremely so in the question of priority of settlement.] We have satisfied that requisite of the statement by saying that the service was posterior to any settlement in the appellant parish.

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Kinglake contra, after citing the case of *Rex v. Middleton Teesdale* (d), was stopped by the Court.

LORD DENMAN C. J.—It appears to me to be necessary to state the grounds of appeal as far as they are known. It would be dangerous to admit a generality of statement which might require an inquiry by the respondents through a period of fifty years. The greater the obscurity attending the facts, the more incumbent is it on the appellants to give as much information as possible.

LITTLEDALE J.—There may be no doubt inconveniences in giving statements as to time with great particularity. A service might be stated at a particular period inaccurately in some degree, and it might be proved that the alleged master at that particular time was dead, and thus greater difficulty would be thrown in the way of the appellant; but, on the whole, I think there are more inconveniences on the other side. If the required particulars cannot be given, some reason may why they were omitted.

(a) 3 P. & D. 462.

(b) 1 N. & P. 109.

(c) 3 P. & D. 42.

(d) 3 P. & D. 473.

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PATTESON J.—In cases of settlement by hiring and service the name of the master and the date may easily be given; and, in general, if they are not, I should impute the omission to some sinister motive.

COLERIDGE J.—It is clearly not enough to shew the cause of appeal, the statute requires the ground of appeal also to be given. The proviso (a) shews the intention of the legislature to require information to be given of the kind of case on which the appellants mean to rely, and to the proof of which alone they are confined, so that the respondents may be prepared. I have some doubt whether the information given in this case was sufficient. But, if it is necessary for us to lay down a rule, I think it better to say that the date of the service should be mentioned as well as the name of the master. I think, however, that the sessions would do well to constitute themselves the judges of the particularity requisite.

Order of Sessions quashed (b).

G.

(a) To section 81.

(b) See *Reg. v. Eastville*, ante, 150.

ANDREWS v. MARRIS and WITHAM (c).

The Commissioners of a court of requests were empowered to award execution against the person of a party ordered to pay money, and thereupon the clerk of the court, at the prayer of the party prosecuting the order, was to issue a precept by way of ca. sa. to the serjeant of the court, who was thereby authorised to take the debtor. The Commissioners were also empowered to order debts to be paid by instalments, and under such terms as appeared to them reasonable, and, on default in paying such instalments, the Commissioners *present in court, upon due proof* of such default, were authorised to award execution for the instalment in the same manner as for the debt first decreed.

TRESPASS for assault and false imprisonment, tried before *Tindal C. J.* at the Lincolnshire summer assizes,

(c) Decided in Hilary term last, (Jan. 11th.)

A party, against whom an order had been made by the Commissioners to pay a sum by instalments, neglected to pay an instalment. Thereupon, at the request of the complainant, and without any previous order of the Commissioners, but according to the

1838, when a verdict was found for the plaintiff 10*l.* damages, subject to the opinion of this Court upon a case.

The following were the material facts of the case. The defendant *Marris* is clerk to the Castor Court of Requests, and *Witham* is serjeant of the court. A person of the name of *Davey*, in due form of law, and according to the provisions of the 47 *Geo.* 3, sess. 2, cap. lxxviii (local, personal and public), made a complaint against the plaintiff before the Commissioners of the Castor Court of Requests for a debt of 5*l.* Judgment passed against the plaintiff, and the entry of the judgment made, according to the practice of the court, was as follows:—"Judgment for the plaintiff for debts and costs, to be paid 10*s.* per month until discharged, otherwise execution to issue." After payment of one instalment the plaintiff refused to pay any more, and the defendant *Marris*, at the request of *Davey*, and without any previous order or warrant from the Commissioners, but according to the practice of the Court, issued a warrant under his hand and seal as clerk of the court, commanding the other defendant *Witham*, as serjeant, to take the plaintiff and deliver him to prison, there to remain for a hundred days, unless the sum of 5*l.* due, with 6*s.* the balance of costs incurred in the recovery thereof, should be sooner paid according to the above order of the court, and also the costs and charges of the execution. These costs and charges were specified at the foot of the warrant and were correct; the warrant itself in form and substance was according to the practice of the court. The warrant was delivered to and executed by *Witham*, and the plaintiff remained in custody the hundred days, for which imprisonment this action was brought.

If the Court should be of opinion that the plaintiff was

practice of the court, the clerk of the court issued a warrant, under which the serjeant of the court took the debtor.


Held, 1, that the warrant was illegal, as execution had not been awarded by the Commissioners *present in court upon due proof* of the default, and that the clerk who issued the warrant was liable in trespass at the suit of the debtor.

Held, 2, that the serjeant who executed the warrant was protected by the warrant, and was not liable.

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entitled to maintain this action against either or both the defendants, the verdict to stand against either or both the defendants; but, if the plaintiff is not entitled against either, a nonsuit is to be entered (a).

(a) The 47 *Geo. 3*, sess. 2, c. lxxviii. is intituled "An Act for the more speedy and easy Recovery of small Debts in the Sokes of Bolingbroke and Horncastle, and other Places in the County of Lincoln." The 29th section enacts, "That in any cause, action. or case, in which the Commissioners of the said court shall have made an order or decree for the payment of money, it shall and may be lawful to and for the said Commissioners present in Court to award execution either against the body or goods of the party against whom such order or decree shall be made, and thereupon it shall and may be lawful to and for the respective clerks and their deputies of the said court, at the prayer of the party prosecuting such order or decree for the payment of money, to issue a precept under their respective hand and seal by way of *capias ad satisfaciendum*, or *fiat facias*, to the respective serjeants of the said court, who by virtue of such precept issued upon execution awarded against the body of such party, shall and may and is hereby empowered to take such party, being within the jurisdiction &c., and carry him, her, or them, to any common gaol or prison in the said county of Lincoln, there to remain until he, she, or they shall perform and obey such order, decree, or judgment for the space or time herein in that behalf particularly directed; and, in case any such precept shall be issued for

execution against the goods and chattels of such party, such serjeant shall and may and he is hereby empowered to levy by distress and sale of the goods and chattels of such party, being within the jurisdiction of the said court, such sum or sums of money, and costs, as shall be ordered, decreed, or adjudged; and if the party against whose body or goods any such execution shall be awarded and process thereupon issued shall, by absconding, or by secreting or removing his, her, or their goods or chattels, or by any other means prevent or evade the service or effect of any such execution, it shall and may be lawful to and for the said Commissioners in the said court, upon due proof thereof made before them by the oath or oaths of one or more credible witness or witnesses, at their discretion to award further execution either against the body or goods and chattels of such party, and process shall issue thereupon, and be served by the respective serjeants of the said court, until the plaintiff or plaintiffs shall be fully paid and satisfied; and *it shall and may be lawful* to and for the said Commissioners from time to time, in case they shall think fit for the ease and convenience of the defendant or defendants, and they are hereby authorized and empowered to order, decree, or adjudge any debt or debts due by plaintiff or plaintiffs to be paid by several payments or *instalments*,

The case was argued in Michaelmas term last by *Whitehurst* for the plaintiff, and *N. R. Clarke* for the defendant (a). The question discussed was how far both or either of the defendants had become liable, the execution not having been awarded, as the act directs, by *the Commissioners present in Court upon due proof* of default in paying the instalment, but having been issued by the defendant *Marris*, as clerk of the court, without the previous order or warrant of the Commissioners. *The Marshalsea case* (b), *Whitelegge v. Richards* (c), *Morse v. James* (d), *Moravia v. Sloper* (e), *Miller v. Seare* (f), *Salmon v. Percivall* (g), and *Painter v. The Liverpool Gas Company* (h) were cited.

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Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court. — The cases of these defendants are to be considered separately, and we are of opinion in the first place

and under such terms and conditions as may appear reasonable and just to them the said Commissioners for the ease of the defendant or defendants, and the security of the plaintiff or plaintiffs; and *it shall and may be lawful* to and for the said *Commissioners present in court*, in case any default or failure of any such payments or instalments so ordered, decreed and adjudged, or directed, shall afterwards be made, and they are hereby authorised and empowered, at the instance of the plaintiff or plaintiffs, and *upon due proof* of the said default or failure, to *award execution* against the said defendant or defendants, or against any other person or persons who may have been security to the said plaintiff or plaintiffs, under the directions of the said Commissioners,

for the payment of such instalments in manner aforesaid, for the whole debt, or such part thereof as shall then remain unpaid, together with such further costs as to them shall seem just and reasonable, and such debt, or such part thereof, and such further costs, shall be recovered by the same ways and means as are herein provided for the recovery of the debt and costs first decreed."

(a) Before Lord Denman C. J. *Littledale, Patteson and Coleridge* Js.

(b) 10 Rep. 68.

(c) 3 B. & B. 188.

(d) Willes, 122.

(e) Willes, 30.

(f) 2 W. Bl. 1141.

(g) Cro. Car. 196.

(h) 3 A. & E. 433; S. C. 6 N. & M. 736.

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that the action is well brought against the defendant *Marris*. The 29th section of the act provides that, where an order is made for payment of money by the Commissioners of the court, "the said Commissioners present in court" may award execution against body or goods, and then the clerk of the court at the prayer of the party may issue a precept under his hand and seal in the nature of a *ca. sa.* or *fi. fa.* to the serjeant, who may execute the same. This provision meets the case of an order for payment, and award of execution for the entire sum, where all is to be paid at once; and it distinguishes between the act of the Commissioners and the act of the clerk, allowing the latter to issue the precept at the prayer of the party to himself, and without any further application to the court. This is analogous to the proceedings in the Courts of common law, where the judgment pronounced leaves no more for the judicial interference of the court, and where execution issues for the entire sum at the application of the party to the officer of the Court.

But the statute provides in the same section for another case, enacting that the Commissioners may from time to time, if they think fit, for the ease of the defendant, order any debt due to be paid by several instalments, and under such terms and conditions as may appear to them reasonable and just for the ease of the defendant and security of the plaintiff, and *the Commissioners present in court*, in case any default of any such instalments shall afterwards be made, may at the instance of the plaintiff, and *upon due proof of the said default*, award execution against the defendant for the whole debt, or such part as shall then remain unpaid, together with such further costs *as to them shall seem just and reasonable*. This enactment, in which all analogy with the proceedings of the ordinary Courts of law is departed from, appears to us clearly to reserve several matters for the judicial discretion of the Commissioners, in case of a default in paying any one of the instalments—they may award execution for the whole, or, under the circum-

stances, they may think the non-payment reasonably explained, and leave their former order untouched; and they are to moderate the further costs, as to them shall seem just and reasonable. Accordingly the Commissioners must be present in court, and there must be due proof of the default. Now it is clear that in the present case the Commissioners thought fit to proceed as to the order for payment under this latter branch of the section, and, although in the same order they state execution is to issue unless the payments are duly made, that must either be understood execution according to the manner and with the guards provided by the statute, or it would be void. For the Commissioners cannot abdicate their judicial functions and delegate them to their clerk, they must act judicially in court, have due proof made before them, and then award as to them seems just and reasonable. The same section empowers them, when they award payment to be made by instalments, to require security from other persons for the payment, and in case of default to award execution against such persons. It was not contended that the same course might have been pursued against sureties, if any had been ordered, as has been taken against this plaintiff, and yet there is but one sentence, and the same wording, for both cases.

It is said, however, that this mode of proceeding is valid, because the case finds it to be according to the practice of the court, and that in this particular case it must be taken to have had the sanction of the court, as much as if there had been a special order made for the purpose. But the answer to this argument is, that the Commissioners have no power to make such a practice as this, or such an order *at the time of the judgment*, because if made then prospectively it dispenses with that proof of non-payment which the statute requires, and with the exercise of any discretion on their part as to the execution or further costs. We think, therefore, that this direction for the issuing of execution engrafted on the original judgment, and made part of

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it, must be considered not merely as irregular but a nullity, and, if so, the clerk has issued a warrant without any authority, which, therefore, cannot protect him, and he is liable for the imprisonment occasioned by its execution.

The case of the defendant *Witham*, however, stands on very different grounds. He is the ministerial officer of the Commissioners, bound to execute their warrants and having no means whatever of ascertaining whether they issue upon valid judgments, or are otherwise sustainable, or not. There would, therefore, be something very unreasonable in the law, if it placed him in the position of being punishable by the court for disobedience, and, at the same time, suable by the party for obedience to the warrant. The law, however, is not so. His situation is exactly analogous to that of the sheriff, in respect of process from a superior Court, and it is the well known distinction between the cases of the party and of the sheriff or his officer, that the former, to justify his taking body or goods under process, must shew the judgment in pleading, as well as the writ, but for the latter it is enough to shew the latter only : *Cotes v. Michill* (a), *Moravia v. Sloper* (b). It was said, indeed, for the plaintiff, that these and the numerous other authorities, which might be cited to the same effect, all went upon the principle that the proceeding, however irregular, was the act of the court, but that here the precept or warrant was found in effect to have issued without any authority from the court, and *Morse v. James* (c) was cited. But in that case the officers of the court chose to join in pleading with the party, and set out the whole proceedings; having done that, unnecessarily for them, they were of course bound by the defects apparent on their pleas. *Philips v. Biron* (d), and *Smith v. Dr. Bouchier* (e), are authorities to shew that where an officer, for whom the writ or warrant alone would have been a justification, joins in pleading with the party, for whom it would not, and who can only defend himself on the validity

(a) 3 Lev. 20.

(b) Willes, 30.

(c) Willes, 122.

(d) 1 Str. 509.

(e) 2 Str. 993.

of the judgment or proceedings, he foregoes the benefit of the warrant. *Morse v. James* (a) is therefore not in contradiction to the general course of authorities, and as the subject-matter of the suit was within the general jurisdiction of the Commissioners, and the warrant appeared to have regularly issued, we think *Witham* was well defended by it, no such point having been made as in the two cases cited from *Strange* to deprive him of its protection.

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Judgment for the plaintiff against *Marris*,
and for the defendant *Witham* (b).

D.

(a) Willes, 122.

(b) See the next case.

CARRATT v. MORLEY, HORN and others.

Tuesday,
May 25th.

TRESPASS for assault and false imprisonment. Plea; not guilty ("by statute").

At the trial before Lord Abinger C. B., at the Lincolnshire summer assizes, the following facts appeared in evidence. The action was brought to recover damages for an imprisonment of the plaintiff under a writ of execution from the Court of Requests for the sokes of Bolingbroke and Horncastle, and wapentake of Candleshoe, &c. The defendant *Morley* was the complainant in a suit instituted in that court against the plaintiff; the defendant *Horn* was the serjeant of the court, who executed the writ, and the other defendants were Commissioners of the court. The court was established by 47 Geo. 3, cap. lxxviii. (c) (sess. 2)

The Commissioners of an inferior court, with jurisdiction to try cases of debt where the debtor resided within a certain district, and to award execution against the person, entertained a claim of debt against one who did not reside within their jurisdiction, and issued a warrant against him, under

(c) The same act came in question in the preceding case.

which he was taken in execution by the officer of the court.

In trespass against the plaintiff below, the Commissioners, and the officer of the Court, Held, 1, That the plaintiff below, who had merely stated his case to the court, was not liable.

2. That the Commissioners were liable.

3. That the officer, who would generally be protected by a warrant under such circumstances, was liable in this case, because the warrant under which he acted did not describe the court by its proper name and style.

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(local, personal and public), intituled "An Act for the more easy Recovery of small Debts in the Sokes of Bolingbroke and Horncastle, and other Places, in the County of Lincoln." This act constituted the persons therein named as Commissioners, and their successors, a court of justice, by the name and style of "The Court of Requests for the sokes of Bolingbroke and Horncastle, and wapentake of Candle-shoe (except the parishes of Hagnaby, Welton in the Marsh, Steeping Magna, and Firsby), in the county of Lincoln; and for the wapentakes of Gartree, Louth Eske, Ludborough, Calceworth, Hill and Walshcroft, the north and south divisions of the wapentake of Yarborough, such parts of the wapentake of Manley as lie east of the river Trent, and the parishes of Faldingworth, Buslingthorpe, Snarford, Friesthorpe, and Hanworth, in the said county." The plaintiff, who resided in the wapentake of Wraggoe, which is expressly excepted from the jurisdiction of the Court (a),

(a) Sect. 18 of the act provides, "That it shall and may be lawful to and for any person or persons (whether such persons shall reside within the jurisdiction of the said court or not) having any debt or debts, upon any contract or agreement, or upon the balance of account, or for or in respect of wages, rent or arrears of rent, or otherwise howsoever (save and except as herein mentioned), not exceeding the value of 5*l.*, due or owing or belonging to him or them, in his or their own right, or in the right of any other person or persons, or as executor, &c. &c., or in any other manner whatsoever, which the said Commissioners are by this act enabled to judge and determine, and not expressly prohibited by this act, by or from any other person or persons whomsoever, *inhabiting, residing or being* within any or

either of the said several sokes, wapentakes, parishes and places herein mentioned (*except* the parishes of Hagnaby, Welton in the Marsh, Steeping Magna, and Firsby, and wapentake of *Wraggoe* aforesaid), or keeping or using any house, coach-house, warehouse, wharf, quay, lodging, shop, shed, stall or stand, or using or frequenting any market or markets there, or seeking a livelihood, or in any way working, trading or dealing within the same, to apply to any clerk or deputy clerk of the said court for the time being, who shall thereupon in due course make out and deliver, or cause to be made out and delivered, to one of the serjeants of the said court for the time being, a summons in writing, under the hand of the said clerk or deputy, respectively directed to such debtor or debtors, expressing

was served, while attending Spilsby market (a place within the jurisdiction of the court), with the following summons :—

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“ The Court of Requests for } You are hereby summoned, required
the soles of Bolingbroke and } and commanded to be and appear
Horncastle, and other places } before the Commissioners at the next
in the county of Lincoln. } Court of Requests to be holden for
the soke of Bolingbroke, at the George Inn, in Spilsby, on Friday, the
15th day of June next, at one o'clock in the afternoon, to answer a
demand made against you by *John Morley*, of Saneethorpe, for the sum
of 3*l*, due to him in the exchange of a horse warranted sound, and
which proved to be unsound, and not to depart the court without
license. And, in case you fail therein, the plaintiff will proceed to obtain
judgment against you. Dated this 28th day of May, 1838.

| | | | |
|------------------|---|---|---|
| Debt | 3 | 0 | 0 |
| Costs (if paid) | 0 | 8 | 7 |
| out of court) | | | |
| | 3 | 8 | 7 |

William Walker,
Clerk of the Court of Requests held at
Spilsby, Wainfleet, All Saints, Sibsey,
and Burgh in the Marsh.”

the sum demanded of him, her or them, and stating the particulars of such demand or cause of action, together with the name of the party demanding the same, and requiring such debtor or debtors to appear at a certain time and place, to be mentioned in such summons, before the Commissioners of the said court, to answer such demand or demands, and such serjeant shall, at least two days before the day appointed for such debtor or debtors to appear, serve or cause such summons to be served on such debtor or debtors, either personally or by leaving the same with his, her or their servant, or other person belonging to him, her or them, or at the dwelling-house, coach-house, warehouse, lodging, place of abode, shop, shed, stall, stand, or other place of dealing, trading or working of such debtor or debtors, being within the jurisdiction of such court, and upon due proof

of such summons having been duly served in manner aforesaid, or upon the appearance of the debtor or debtors, the Commissioners present in court (such number present not being less than by this act according to the quantum of the debt is directed) are hereby empowered and required to make due inquiry concerning such demands and complaints, and make such orders and decrees therein, and pass such final sentence or judgment thereupon, and award such costs of suit as to them shall seem most agreeable to equity and good conscience, and as well the plaintiff as the debtor whom such orders, decrees, or judgments and proceedings shall respectively concern, shall duly observe, perform and keep the same respectively.”

Sect. 29 gives the Commissioners power to issue execution against the person or goods of the debtor.

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The plaintiff did not appear, and on his default, the following minute and order of the Court was made :—

"The Court of Requests for the sokes of Bolingbroke and Horncastle and wapentake of Candleshoe (except the parishes of Hagnaby, Welton in the Marsh, Steeping Magna, and Firsby), in the county of Lincoln, and for the wapentake of Gartree, &c. }

At a Court of Requests at the soke of Bolingbroke, held at the George Inn at Spilsby, on Friday the 15th day of June, 1838, by virtue of an act of parliament made and passed in, &c. and

intituled &c., before &c. [naming the Commissioners], gentlemen, Commissioners appointed for putting the said act into execution.

John Morley, of Sancethorpe, } A debt due on the balance of
 against *William Carratt*, } account in the value of a
 trading at Spilsby. } horse on promises.

Appeared the plaintiff and *Joseph Horn*, who proved the debt and service of the summons on oath. Defendant not appearing, it is ordered that the defendant be committed to the house of correction at Spilsby for sixty days, unless the debt and costs are in the meantime fully paid and satisfied.

By order.

William Walker, jun.

Deputy Clerk."

Upon this adjudication a warrant was issued in the following form :—

"The Court of Requests for the sokes of Bolingbroke and Horncastle, and other places } These are in her Majesty's name to
 in the county of Lincoln. } require you and each and every of
 you, jointly and severally, to take
 and commit to prison, in the com-

mon gaol or house of correction at Spilsby, in the said county, the body of the said defendant *Wm. Carratt*, trading at Horncastle in the said county, farmer, there to remain for the space of sixty days from the time of his commitment, unless the sum of 3*l.* debt, and 11*s.* 2*d.* costs of suit, be in the meantime fully paid and satisfied unto the said complainant, *John Morley*, according to an order of the said Court of Requests, made at Spilsby, in the said county, on the 15th day of June inst., and also the costs and charges of this execution. Hereof fail not, as you will severally answer the contrary at your peril.

Given under my hand and seal this 21st day of June, 1838.

By order of the Court.

Wm. Walker, jun.

Deputy Clerk of the Court of Requests
 held at Spilsby aforesaid.

To *Joseph Horn*, Serjeant of the said Court, held at Spilsby aforesaid, or to his deputy, and also to Mr. *Thomas Sanders*, the Keeper of the House of Correction at Spilsby, and to each and every of them."

The plaintiff was apprehended under this warrant. This was the assault and imprisonment complained of. The plaintiff paid the debt and costs to obtain his liberation.

For the plaintiff it was contended that the proceedings in the inferior court did not justify the arrest of the plaintiff, because the plaintiff was not resident within the jurisdiction of the court, and there was no evidence that he was a trader within the meaning of the act; that the process was void, because it did not adopt the style of the court as given by the act, and because the warrant did not pursue the summons in the statement of the cause of action.

For the defendant *Morley* it was contended that he was not liable for the acts of the court, as he had done nothing more than state his complaint to a court of justice. For the defendant *Horn*, the serjeant, it was contended that he was justified by the warrant of the court, which he was bound to obey. For the other defendants, the Commissioners, it was contended that they were not liable in trespass, because they had jurisdiction over the subject-matter generally, and also over the particular case if the plaintiff had, in fact, traded within the jurisdiction, and that an erroneous judgment upon this fact would not make them so liable, the proper remedy being to restrain them by prohibition.

The lord chief baron inclining to think that neither *Morley* the plaintiff below, nor the Commissioners, were liable, directed a verdict for them, giving the plaintiff leave to move to enter a verdict against them (a). His lordship also directed a verdict to be entered for 5*l.* against *Horn*, the serjeant, giving leave to move to enter a verdict for him, on the ground that he was protected by the warrant, or to move for a nonsuit generally.

Cross rules having been obtained accordingly,

(a) With the exception of one cation, though his name appeared on the minutes.
of them, who was proved not to have been present at the adjudi-

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Balguy and *N. R. Clarke* shewed cause (a) against the rule to enter the verdict against *Morley* and the Commissioners, and supported the rule to enter the verdict for *Horn*.

Morley, the complainant in the court below, could not be made liable without proof that he acted maliciously in putting the court in motion: *Cohen v. Morgan* (b).

As to the Commissioners, it is not clear that they had not jurisdiction over the plaintiff *Carratt* in this case. It appeared, certainly, at the trial that he resided out of the jurisdiction, but he may have traded within it. The plaintiff was bound to shew that he did not trade within the jurisdiction, for the judgment of the court below afforded at least *prima facie* evidence that he did so trade, or, perhaps, like a conviction by justices, was conclusive upon that as upon every other fact stated in it: *Brittain v. Kinnaird* (c), *Aldridge v. Haines* (d). The Commissioners, at all events, had such general jurisdiction over the cause as will protect them: *The Marshalsea case* (e), *Cave v. Mountain* (f); and, if they had not, prohibition was the proper remedy. But if the warrant, which is said to be erroneously intitled, was not the warrant of the court, the Commissioners cannot be liable, for it is not their warrant.

Lastly, as to *Horn*, the serjeant, he was bound to obey, without criticising the warrant, and is therefore protected by it: *Andrews v. Marris* (g). Although the warrant had not the exact style of the Court, it was so headed as to justify the officer in acting upon it.

Goulburn Serjt. and *Whitehurst* contra. The defendant, *Morley*, the complainant in the court below, is liable if that court had not jurisdiction. Where the plaintiff below

(a) The case was argued at the sittings after last Hil. term (Feb. 4 and 5), before Lord *Denman* C.J. *Littledale* and *Patteson* Js.

(b) 6 D. & R. 8.

(c) 1 B. & B. 432.

(d) 2 B. & Ad. 395.

(e) 10 Co. 68 b.


(f) 1 Scott, N. S. 132.

(g) See the preceding case.

justifies under process of an inferior court, he must shew that the cause of action arose within the jurisdiction of the court, although the officer who executed the process need not. "As it is said in the case of *Higginson v. Martin*(a), a plaintiff may sue if he please in the Courts of Westminster Hall, and then he will be safe; but, if he will sue in an inferior court, he is bound at his peril to take notice of the bounds and limits of its jurisdiction : " *Mcra via v. Sloper* (b); and *Morse v. James* (c); *Perkin v. Proctor* (d), are also authorities for the same position.

The cases already cited tend also to shew that the court did act without jurisdiction, and that the Commissioners and serjeant are also liable. If the court having no jurisdiction in cases of assumpsit had assumed it, it is clear from the *Marshalsea* case that the whole proceedings would have been coram non judice and void. "If the matter appears to be out of the jurisdiction, the judgment is void, and coram non judice:" *Com. Dig. Courts* (P. 15): so where, as in this case, the court had no jurisdiction over the party, all the proceedings must be void. The plaintiff neither resided nor traded within the jurisdiction. No evidence was offered on either side at the trial with respect to the plaintiff's trading, and it lay on the defendants to prove it. It must be taken, therefore, that he did not so trade, for the judgment of the inferior court is not like a conviction by justices, which is a record and not traversable. The judgment, if good on the face of it, could not be relied on as evidence of the trading; but this judgment, which does not even ascertain the amount of debt and costs, is bad. *Miller v. Seare* (e) and *Smith v. Bouchier* (f) shew that the judicial capacity of the Commissioners will not of itself protect them if they have acted without jurisdiction.

Andrews v. Murris (g) is no authority for *Horn*, the serjeant. In that case the court had jurisdiction, and, every

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(a) 2 Mod. 197.

(b) Willes, 34.

(c) Willes, 122.

(d) 2 Wils. 382.

(e) 2 W. Bl. 1141.

(f) 2 Str. 993.

(g) See the preceding case.

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thing being regular except the judgment, this Court held the officer was protected by a good warrant. Here the whole proceedings want jurisdiction, and the warrant to which the defendant resorts is bad per se because it has not the proper style of the Court (a).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—*Morley* sued *Carratt* as a resident within the jurisdiction of the Spilsby Court of Requests, and obtained judgment by default against him, his residence being in the wapentake of Wraggöe, which is expressly exempted from the jurisdiction of the court. *Carratt* has brought trespass against *Morley* who sued him, against six of the Commissioners who signed the warrant or capias, and against *Horn*, the officer who arrested him, and so obtained the money from him. The plea was not guilty (by statute). On the trial Lord Abinger thought *Morley*, the plaintiff in the court below, not liable, inasmuch as he had only stated his case to the Commissioners, who proceeded to adjudicate upon it; he had some doubts whether the Commissioners were liable, because they did not make the warrant; and it was argued that *Horn*, the officer, was not liable, because the warrant would protect him. Leave was therefore reserved to move for a nonsuit generally, and, on the other hand, for a verdict against all the defendants except one, who was shewn to have been absent when the judgment was given and the warrant was issued, or against such of them as this Court should hold to be liable.

We have heard the rules argued, and are, in the first place, clearly of opinion with the Chief Baron that the original plaintiff is not liable, for the reason before stated. *Cohen v. Morgan* (b) was cited at the bar, and it is clear from that and other cases, and upon principle, that a party who

(a) Another point also was made because it was for unliquidated damages.
that the inferior court had no jurisdiction over the complaint,

(b) 6 D. & R. 8.

merely originates a suit by stating his case to a court of justice, is not guilty of trespass, though the proceedings should be erroneous or without jurisdiction. The doubt as to the Commissioners' liability arose from the possibility, as the case was undefended, that there might have been evidence to convince them that the defendant in that suit resided within their jurisdiction. Nothing, however, of this sort appears, nor can we be justified in inferring it from the mere fact that the Court acted in a manner which required it to warrant their proceeding. They ordered that *Carratt* should be committed to the house of correction for sixty days, unless the debt and costs were first paid. The warrant thereupon made out by the clerk was made by their order, and, it being without legal authority, they are liable in trespass for the imprisonment which ensued. The warrant itself was objectionable and void, not truly describing the Court of Requests, nor following a style and form prescribed by the act. This ought to be considered as the act of their clerk, not of themselves; but they would have been liable for the excess of jurisdiction, however perfect the form of the warrant might have been.

This defect in the warrant, however, deprives the officer of a justification which he would have possessed, if it had been correct, or even substantially good. In that case the recent decision of this Court in *Andrews v. Marris*(*u*) would have applied; but, as the warrant here was such as no law authorised, it can be considered as no more than waste paper, and can afford no justification. There the officer was misled by the clerk furnishing him with a warrant good in form, and issued according to the practice of the Court, though the cause was beyond its jurisdiction. Here the cause was beyond the jurisdiction, and the warrant was contrary to the practice.

The rule for a nonsuit must therefore be discharged, and so must that for entering a verdict against *Morley*.

We think the course taken at nisi prius perfectly correct.

D.

Rule accordingly.

(*a*) See the preceding case.

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Saturday,
June 12th.

Although the plaintiff has proceeded against the bail upon a bail bond, given under 1 & 2 Vict. c. 110, s. 4, he may also proceed against the defendant in the original action.

BETTS v. SMYTH.

THIS was a rule calling on the plaintiff to shew cause why proceedings in an action on a bail bond, given under stat. 1 & 2 Vict. c. 110, s. 4, should not be stayed, on the ground that the plaintiff, after taking an assignment and proceeding upon the bail bond, had gone on and obtained judgment against the defendant in the original action.

Martin shewed cause (a), and cited *Brown v. McMillan* (b). "All subsequent proceedings" after the bail bond has been given, are by the 4th section of the act to be according to the old practice. He cited also 1 *Chitty's Pract.* 560 (c).

Murphy, contra.

Cur. adv. vult.

LORD DENMAN C. J. at the sittings after this term (June 19) delivered the judgment of the Court.—This was a rule to stay proceedings on a bail bond given under 1 & 2 Vict. c. 110, by reason of the plaintiff having proceeded in the original action.

The argument was that the defendant, who must indemnify the bail, ought not to be harassed with two judgments, and that as, under the former practice, the plaintiff could not proceed in the original action after taking an assignment of the bail bond, so he ought now to be confined to one or the other course.

The answer is that formerly the putting in bail above was a step in the cause, and the only mode by which the defendant could appear in a bailable action; and, till that was done, the defendant was not in Court, so as that the plaintiff *could* proceed against him. The taking an assignment of the bail bond was not a circumstance which prevented him from proceeding in the action against the defendant, al-

(a) Before Lord Denman C. J.,
Patteson, Williams, and Coleridge
J^s.

(b) 7 M. & W. 196.
(c) 7th edit.

though it did prevent him from proceeding against the sheriff. Whether he took an assignment of the bail bond, or whether he proceeded against the sheriff, he was equally unable to proceed against the defendant, till bail above was put in, because he was not in Court. But now the defendant, or the plaintiff for him, may enter an appearance in all cases, whether there has been an arrest or not, as every action is commenced by writ of summons, and the putting in bail above is no step in the cause and is wholly collateral. No impediment to the plaintiff's proceeding in the cause against the defendant arises from the defendant having been arrested under the 1 & 2 Vict. 110, for the defendant is in Court by the entry of a common appearance whether bail above be put in or not. The reason why both courses could not be taken under the old practice was not on account of any hardship towards the defendant, but because the forms of the Court would not allow the plaintiff to proceed against the sheriff, or the bail to the sheriff, by reason of bail above *not* having been put in, and at the same time against the defendant as being in Court, which he could only be by reason of bail above *having* been put in, the two proceedings at the same time involving a manifest contradiction. Therefore, declaring in chief (not *de bene esse*) against the defendant was a waiver of bail, because it admitted the defendant to be in Court, that is, that bail had been already put in.

The hardship in the present case, if any there be, cannot therefore be urged as a reason for making this rule absolute by analogy to the former practice, but in truth there is no hardship. The bail to the sheriff have entered into a distinct engagement to put in bail above, and, if they fail to do so, cannot complain that they are sued. If *they* pay the debt and costs, the proceedings against the defendant will be stayed, on payment of costs only; or if the *defendant* pay the debt and costs, the proceedings against the *bail* will be stayed on the same terms.

On the other hand, if we were to make the rule absolute,

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great difficulty might arise if a *capias* were ordered under the 1 & 2 *Vict.* c. 110, in a late stage of the cause; it might be very doubtful whether the plaintiff could recover on the bail bond the costs of the most expensive part of the cause, the preparing for trial, or perhaps the trial itself; costs which were certainly not recoverable against the bail to the sheriff formerly, because they never could be incurred where no bail above had been put in; but now they may, for the defendant may not attempt to go abroad till he is just on the eve of having a verdict against him.

For these reasons we are of opinion that the present rule must be discharged.

Rule discharged.

*Tuesday,*  
*May 25th.*

The Bristol Dock Company were required to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel.

Held,

1. That a duty was cast upon the Company to repair generally the banks of the new course.

2. That mandamus would lie to compel the Company

to repair, although there might be another remedy by indictment.

3. That to a mandamus, commanding the Company generally to repair the banks, it was not a good return, that they had maintained the channel with equal depth and breadth at the bottom, and with equal inclination of the sides to the old channel.

#### THE QUEEN v. THE BRISTOL DOCK COMPANY.

**MANDAMUS** to the Company to repair the bank of a canal.

The writ recited part of the 30th section of 43 *Geo.* 3, cap. cxi. (local, personal and public), intituled, "An Act for improving and rendering more commodious the Port and Harbour of Bristol," whereby the Company were (*inter alia*) commanded "*to make, complete and maintain* a new course or channel for the River Avon, from &c., through &c.; the same to be of equal depth and breadth at the bottom, and with equal inclination of the sides, as the present river course then had in those parts thereof which had not been excavated or embanked by quay walls or other buildings, or as near as circumstances would admit, and except only in such part of the said new course as should be cut through rock or stone, and also to make complete and maintain such other works and improvements within the limits after mentioned, as the Company should consider neces-

sary for, and which would completely answer and effect the purposes aforesaid." The writ then recited that the Company had, in pursuance of the above powers, made the new channel in question, and proceeded thus—"We have been given to understand that, since the making and completing of the said new course or channel of the River Avon, certain parts of the south bank or side of the new course or channel, not cut through rock or stone, lying between Harford's Bridge and Hill's Bridge, in the said city and county of Bristol, have become and now are broken down and out of repair, and the inclination of the sides of the said parts of the said south bank or side of the said new course of the channel has been thereby greatly altered since the construction thereof, to the great danger of the obstruction of the navigation of the said river, and to the great damage and prejudice of all our liege subjects, having occasion to use and navigate the same." The writ concluded by requiring the Company to repair the said parts of the said south bank of the said new course or channel of the said River Avon, lying between Harford's Bridge and Hill's Bridge, or that the Company should shew cause, &c.

The return was as follows:—1. That the Company are not required by the said statute in the said writ mentioned, nor are they otherwise liable to repair and maintain the said parts of the south bank of the new course of the River Avon, in the writ mentioned. 2. That, as near as circumstances have admitted or do admit, they have maintained the said new course of equal depth and breadth at the bottom, and with equal inclination of the sides as the then present river, at the time of the said act of parliament, past in the forty-third year of *George the Third*, had in those parts thereof, which had not then been excavated or embanked by quay walls or other buildings, and except only in such parts of the said new course as have not been cut through rock or stone. Wherefore, for the reasons above returned, the Bristol Dock Company cannot and ought not to repair

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or maintain the said part of the said south bank, as by the said writ they are commanded.

The case came on for argument after a concilium.

The prosecutor's points were:—That the Company were liable to repair and maintain the bank. That the writ commanded the Company to repair and maintain the south bank of the new course, and that it was no answer to say that the Company, as near as circumstances had admitted or did admit, had maintained the said new course of equal depth and breadth at the bottom, and with equal inclination of the sides as the old river course had. That by the act the Company were bound to repair the new course and the banks thereof absolutely.

The points for the Company were:—That the return was good. That mandamus would not lie in such a case. That, if mandamus were the correct mode of proceeding, the writ did not disclose any liability on the part of the Company to repair the bank as required. That it was consistent with the writ that the inclination of the bank they were ordered to repair was the very *same* inclination which was required by the statute.

Sir J. Campbell A. G. against the return (a). Mandamus is the proper remedy, *Rex v. The Bristol Dock Company* (b), and it is no objection that there is another remedy by indictment; *Rex v. The Severn and Wye Railway Company* (c).

As to the liability of the Company to repair, they are required to "maintain" the new course, which involves the duty of repairing its banks. Even at common law they would have been charged with this duty: *Rex v. The Inhabitants of Kent* (d), *Rex v. The Inhabitants of Lindsey* (e), *Rex v. Kerrison* (f).

(a) The case was argued in Mich. T. last (Nov. 20), before Lord Denman C. J., Little-
dale, Patteson and Coleridge Js.

(b) 6 B. & C. 181; S. C. 9 D.

& R. 309.

(c) 2 B. & Ald. 646.

(d) 13 East, 220.

(e) 14 East, 317.

(f) 3 Mau. & S. 526.

The return, that the Company has preserved the inclination of the bank, is no answer to the complaint that it is out of repair. The altered inclination of the bank is merely alleged as a consequence of their default to repair, and the writ would be good if all the words, as to the altered inclination, were struck out. The Company return also that they have maintained the inclination as near as circumstances admit, but the mandatory part of the *writ* says nothing about such inclination or such circumstances. The *act*, indeed, does qualify the duty of the Company with respect to the inclination, by saying they are to maintain it as near as circumstances admit. The return should, at all events, have particularised the circumstances which have made a strict compliance impossible. It is not sufficient for the return merely to follow the general terms of the act: *Rex v. The Ouze Bank Commissioners* (a).

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Sir F. Pollock *contra*. Mandamus does not lie for general repairs. *Rex v. Bristol Dock Company* (b) was not a case of mandamus for repairs; and *Rex v. The Inhabitants of Kent* (c), *Rex v. The Inhabitants of Lindsey* (d), *Rex v. Kerrison* (e), were not cases of mandamus. Indictment, on which error may be brought, is the convenient and usual remedy in a case like the present, especially as *danger* of obstruction is all that is alleged. *Rex v. The Severn and Wye Railway Company* (f) was doubted in the recent case of *Reg. v. Gamble* (g). In a late case the Court refused a mandamus for repairs, as not being the proper remedy: *Rex v. The Trustees of the Oxford and Witney Road* (h).

The duty of repairing the bank is not in terms created by the act, and Tindal C.J., in *Parnaby v. Lancaster Canal Company* (i), was inclined to think that no such duty ex-

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|--------------------------------------------|--------------------------------------------|
| (a) 3 A. & E. 544. | (f) 2 B. & Ald. 646. |
| (b) 6 B. & C. 181; S. C. 9 D. & R. 309. | (g) 11 A. & E. 69; S. C. 3 P. & D. 122. |
| (c) 13 East, 290. | (h) 4 P. & D. 154, not then re- ported. |
| (d) 14 East, 317. | (i) 3 P. & D. 172. |
| (e) 3 Mau. & S. 526. | |

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isted at common law. There are many other works which the Company are in terms commanded to "repair." (He referred to several sections of the act to this effect.) It was probably because the Company are under no general obligation to repair the bank, that the complaint as to the state of its repair was blended with a statement as to the altered inclination, and the danger to the navigation, so as to raise a semblance of injury to the public, for the Company certainly are required to keep up the inclination. It is the "*course*," i. e. the scope for navigation, that the legislature confined its attention to; it is the "*course*" which the Company are required to maintain, and this they say they have maintained.

The return is good, for the reason already adverted to—the complaint as to the inclination of the bank is inseparably blended with the complaint as to want of repair, and the inclination is all the Company are bound to maintain.

Sir *J. Campbell* A. G. replied.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—The Bristol Dock Company, to whom this writ of mandamus was addressed, are created by a local act, 43 *Geo.* 3, cap. cxl., to improve the port and harbour of Bristol, by doing certain works, which are the making, completing and maintaining a new course or channel for the Avon, from, at or near the Redcliffe, by a certain line into the Avon, at a point described, "the same to be of equal depth and breadth, at the bottom, and with equal inclination of the sides, as the then present river course then had in those parts thereof which had not been excavated and embanked by quay walls or other buildings, or as near thereto as circumstances will admit, and except only in such parts of the said new course as should be cut through rock or stone."

The 30th clause expressly requires them to make, complete and maintain these works, and the writ, after reciting the enactment, proceeds to allege that the Company did make and complete them, but that since the making and completing of the said new course or channel of the Avon, certain parts of its south bank or side, not cut through rock or stone, have become and now are broken down and out of repair, and the inclination of the said side of the said parts of the new course or channel has been thereby greatly altered since the construction thereof, to the injury of the navigation. It then enjoins defendants to repair and maintain the said parts of the said south bank.

The return of the Company is, that they are not bound to repair and maintain the said parts of the said south bank of the said new course or channel; and that, as near as circumstances have admitted or do admit, they have maintained the said new course or channel of equal depth and breadth at the bottom, and with equal inclination of the sides, as the river, in the 43 *Geo. 3*, had in those parts, which had not then been excavated or embanked by quay walls or other buildings, and except only in those parts thereof which had been cut through rock or stone.

On argument, objection was taken to the writ because it only enjoined the doing that for omitting which the Company are liable to indictment.

But we think, even if such an objection did not come too late, after the writ was issued, that it is entitled to no weight. Those who obtain an act of parliament for executing great public works, are bound to fulfil all the duties thereby thrown upon them, and may be called upon by this Court so to do. If this breach of contract causes a public nuisance also, that cannot dispense with the necessity of a specific performance of the obligation contracted by them.

Then the return is insufficient, merely denying the liability to repair the south bank. This is traversing matter of law, and the law is clearly against them, for the south bank of the new channel plainly appears to be a part of the works

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done under the act, which the Company are bound to repair. The added statement that, as near as circumstances would admit, they have kept the inclination equal (which might possibly have been an answer if the mandatory part of the writ had merely required such inclination to be preserved), is certainly no answer to the writ, as it is framed; for the want of such equality of inclination is merely stated as a consequence of their omission to repair and maintain. If so, a peremptory mandamus must be awarded.

Peremptory mandamus awarded.

D.

The QUEEN v. DEANE, Esq. and others, Justices of the Borough of READING.

Saturday,
June 5th.

Under 9 *Geo. 4*, c. 61, s. 27, an appeal lies to the quarter sessions of the county against the refusal of borough justices to grant a licence to sell beer, &c., although the borough has a charter with a ne intronittant clause, and has also separate quarter sessions under 5 & 6 *Will. 4*, c. 76, s. 103.

ON appeal, by *Joseph Wilson*, to the Berkshire Quarter Sessions, against a refusal made by the defendants, at the general annual licensing meeting, holden for the borough of Reading, to grant him a licence to sell exciseable liquors by retail to be drunk on his premises, the sessions reversed the decision of the defendants, and ordered that the licence should be granted.

A rule had been obtained, on affidavits stating that Reading was a borough, to which charters of the 14 *Car. 1* and 1 *Will. 4*, with ne intronittant clauses, had been granted, and also a separate quarter sessions under 5 & 6 *Will. 4*, c. 76, to shew cause why the above order of the county sessions should not be quashed, on the ground that they had no jurisdiction.

Sir F. Pollock and *Carrington* shewed cause. This rule has been obtained on two grounds; first, that there never was any right of appeal to the county sessions against the refusal to license under 9 *Geo. 4*, c. 61; second, that if there ever was such right of appeal, it has been taken away by the Municipal Corporation Act, 5 & 6 *Will. 4*, c. 76.

1. The first point seems open to no doubt whatever. The 9 *Geo.* 4, c. 61, s. 27, enacts "that any person who shall think himself aggrieved by any act of any justice, done in or concerning the execution of this act, may appeal against such act to the general or quarter sessions of the peace holden for the county or place wherein the cause of such complaint shall have arisen;" "and in case the act appealed against shall be the *refusal* to grant or transfer any *licence*, and the judgment under which such act was done be reversed, it shall be lawful for the said court to *grant* or to transfer such *licence*, in the same manner as if such licence had been granted at the general annual licensing meeting, or had been transferred at a special session."

2. Is this right of appeal taken away by the 5 & 6 *Will.* 4, c. 76? The 105th section of that statute enacts that where a borough has a grant of quarter sessions under the act, the recorder shall sit as sole judge, "and such court of quarter sessions of the peace shall be a court of record; and shall have cognisance of all crimes, offences and matters whatsoever, cognisable by any court of quarter sessions of the peace for counties in England." So far the words of this section might be considered adverse to the appeal, but the proviso gets rid of the difficulty;—"provided, nevertheless, that no recorder, by virtue of his office, shall have power to make or levy any county rate, or rate in the nature of a county rate, or to *grant* any *licence* or authority to any person to keep an inn, alehouse or victualling-house, to sell exciseable liquors by retail, or to exercise any of the powers herein specially vested in the council of such borough." It was not probable that the appeal against the acts of borough justices would be transferred to their own officer; but the above proviso sets the question at rest. The recorder is to have nothing to do with licensing: the appeal therefore cannot be to him; and, unless it is still to the county sessions, it is gone altogether. General words in a subsequent act shall not repeal the particular provisions of a former

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act: *Williams v. Pritchard* (a). The words of sect. 111 of the same act will be pressed against the appellant, that "after the said 1st of May, 1836, the justices assigned, or hereafter to be assigned to keep the peace in and for the county in which any borough is situate, to which his majesty *shall not* have granted that a separate court of quarter sessions of the peace shall be holden in and for the same, shall exercise the jurisdiction of justices of the peace in and for such borough as fully as by law they and each of them can or ought to do in and for the said county; and *no part* of any borough, in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough, *before the passing of this act, was exempt*, any law, &c. to the contrary notwithstanding." Perhaps this section applies only where parts of counties have been newly thrown into the boundaries of a borough, in which case the added portion of the borough is to have the same exemption which the old borough had from county jurisdiction. But, at all events, the section does no more than continue such exemption as existed before the passing of the act; and as the borough of Reading was not exempt, before the 5 & 6 Will. 4, c. 76, from the jurisdiction of the county justices under 9 Geo. 4, c. 61, it is not so now.

Sir J. Campbell A. G., Sir W. W. Follett, *Tyrrwhitt*, and *Bros*, contra. 1. There never was any appeal under 9 Geo. 4, c. 61, to the county sessions. The grant of a licence was always a matter entirely within the discretion of the justices. By the first section of the act the justices, "acting in and for such county or place," are to license such persons as they, "in the exercise of their discretion, deem fit and proper." By sect. 27 (the appeal clause) "any person who shall think himself *aggrieved* by any act of any justice," may appeal to the county sessions. But grievance means a wrong done, where the law is vio-

lated : if the applicant had not been heard, or the licence were refused on corrupt grounds, the party would be *aggrieved*, but not where a fair judgment is given. In *Bassett v. Godschall* (a) it was held that an action would not lie against justices for refusing to grant the plaintiff a licence, that being a matter within their discretion. So in the case of *Rex v. Young and Petts* (b), Lord Mansfield declared "that this Court had no power or claim to review the reasons of justices of the peace, upon which they form their judgments in granting licences, *by way of appeal* from their judgments, or overruling the discretion intrusted to them." [Lord Denman C. J. Then you are prepared to satisfy those words in the 27th section,—“and in case the act appealed against shall be the refusal to grant or to transfer any licence,”—by contending that they mean a refusal to entertain the question or to grant the licence from some corrupt motive?] That is the argument. If the words, “any act of any justice,” had stood alone, it would hardly have been contended that any right of appeal would have arisen. [Sir F. Pollock mentioned the case of *Rex v. Justices of Middlesex* (c).] There was no question there as to the sort of refusal which might be appealed against; the only question was, whether a party consequentially injured could appeal. If there is an appeal to the county justices on the merits, how can it be said that the licensing justices have any “discretion?” As a matter of policy it is certainly desirable that the jurisdiction to license should be vested in the justices, who have the best local information on the subject.

2. If there ever was an appeal to the county sessions, it is taken away by 5 & 6 Will. 4, c. 76. The 111th clause is general, and makes no exception in favour of any right of appeal, but excludes any jurisdiction whatever of county justices in the borough. The reason why an appeal was allowed from the borough justices to the county justices—

(a) 3 Wils. 121.

(c) 3 B. & Ad. 938.

(b) 1 Burr. 562.

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that otherwise the appeal would have been from *iisdem* to *eodem*—no longer exists. The recorder would be now the appellate judge, who has nothing to do with the original jurisdiction. The appellant must, under the 27th sect. of 9 *Geo.* 4, enter into a recognisance. Will it be said that a county justice can take the recognisance in this case, notwithstanding the *ne intromittant* clause? It is by no means clear that the proviso which has been relied upon, at the end of the 105th sect. of 5 & 6 *Will.* 4, has the effect of excluding the appellate jurisdiction of the recorder over licences: the words rather seem to point to his original jurisdiction as a borough justice. But, suppose the proviso to have the effect, it still lies with the appellant to shew that there is an appeal to the county justices. The words in the Municipal Corporation Act are, as to the jurisdiction of county justices, negative words, which have great power in repealing a merely affirmative provision. On this point they cited *Reg. v. The Recorder of Hull* (a), *Reg. v. The Inhabitants of Bridgewater* (b), *Rex v. The Justices of Leicester* (c), *Rex v. The Justices of Essex* (d), and the judgment of Coleridge J. in *Rex v. The Poor Law Commissioners* (in *re St. Pancras*) (e).

LORD DENMAN C. J.—Two questions have been raised in this case. First, whether, before the Municipal Corporation Act, there was any appeal to the quarter sessions against a refusal by justices to grant a beer licence. That point has been argued with a great deal of ingenuity. But I must say that I heard the argument with some surprise, and without a particle of doubt, because I think it impossible for any legislative provision to be clearer than the 9 *Geo.* 4, c. 61, s. 27. It enacts most distinctly that a party to whom justices shall refuse a licence may appeal to the

(a) 3 N. & P. 595.

(d) 5 Mau. & S. 513.

(b) 2 P. & D. 586.

(e) 6 A. & E. 7; S.C. 1 N. &

(c) 7 B. & C. 6; 9 D. & R. 772. P. 371.

quarter sessions of the county against their refusal. No ingenuity can throw a doubt upon the meaning of this part of the section. On the first part of the section doubt might perhaps have been raised as to the nature of the grievance which would give the right of appeal; but, when it is afterwards said, "in case the act appealed against shall be the refusal to grant or to transfer any licence," can there be any question that a refusal to license is one of the acts against which the appeal was given? The instances put for the purpose of satisfying the above words, as that justices may refuse to hear the application, or may refuse to license from corrupt motives, are quite insufficient, for they could not with any propriety be described by the words in question.

Has, then, the Municipal Corporation Act taken away the appeal to the justices of the county? Under the 103rd section the borough of Reading has a grant of separate quarter sessions and a recorder. The powers of the recorder are defined by the 105th section: he is to be sole judge of the borough, and is to "have cognisance of all crimes, offences and matters whatsoever, cognisable by any court of quarter sessions of the peace for counties in England, and the said recorder shall have power to do all things necessary for exercising such jurisdiction, notwithstanding his being such sole judge, as fully as any such last mentioned court." These words are certainly large enough to give the recorder power to hear an appeal against the refusal of borough justices to grant a licence. But lest that power should be exercised by him, and to remove all doubt on the subject, the section concludes with a proviso, which says that he shall not have power to "grant any licence or authority to any person to keep an inn, alehouse," &c. It is precisely therefore as if it had been enacted "that the recorder should have power to do all things that the court of county quarter sessions could do except to grant a licence,"—which power is certainly involved in the power expressly given to such quarter sessions by 9 Geo. 4,

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c. 61, s. 27, that, in case they should reverse the judgment of the licensing justices, "it shall be lawful for the said court to grant or to transfer such licence in the same manner as if such licence had been granted at the general annual licensing meeting." Then the question is, whether the jurisdiction of the county sessions in this matter is taken away by the 111th section of the Municipal Corporation Act. [His Lordship read the section.] The language of this section is extremely large—large enough to deprive the county justices of all power whatever of acting in this borough. But I apprehend this language must be taken to apply to their *ordinary* power as justices of the peace, and not be taken to repeal the 9 *Geo.* 4, c. 61, s. 27; for the 9 *Geo.* 4, c. 61, s. 27, had already been repealed (if one may so express it) by the general language in a preceding (the 105th) section of the Municipal Act; and then, after having been so repealed by that general language in the section, it is expressly singled out and kept alive by the concluding proviso. To what purpose, if the power so saved was to be swept away again by the 111th section? I am not insensible to the observations that have been made as to the policy of confining the power of licensing to those who are best acquainted with and have to preside over the borough. At the same time general observations of that sort, which indeed would have been equally applicable before the passing of the Municipal Act, cannot justify us in departing from the letter of a clear enactment.

PATTESON J.—I am of the same opinion. The 27th section of 9 *Geo.* 4, c. 61, is so clear as to preclude all argument. To say that a refusal to grant a licence means a refusal to entertain the application for a licence, or means anything but "a refusal to grant a licence," in the ordinary sense of the terms, would be doing violence to language which is as plain as any thing can be. It is then said that, as the licensing justices have, by sect. 1, "to grant licences, &c. to such persons as they, the said justices, shall, in the

execution of the powers herein contained, and in the exercise of their *discretion*, deem fit and proper, it could not have been intended to control their discretion by allowing an appeal against it. That might be a very fair argument if the appeal were given entirely in general terms, as it is in the first part of the 27th section, to a party "aggrieved by any act of any justice done in or concerning the execution of this act; but the argument fails as soon as you come to the words, "in case the act appealed against shall be the refusal to graut or transfer any *licence*." Had it not been for these special words, it might have been said (I give no opinion on the point) that a party, to whom a licence was refused, having no sort of vested interest, could not, in any sense, be a party "aggrieved." This refusal, however, does by the above special words make him a party "aggrieved."

With regard to the second question, whether the Municipal Act has taken away the right of appeal to the county, I should have had no difficulty upon that either, if it were not for the 105th section of that act. The 111th section appears to me to be pointed to a different object. In many boroughs the Municipal Corporation Act had destroyed their old quarter sessions, but had not destroyed their ne intromittant clauses. Therefore, if the former part of the 111th section had not given to county justices jurisdiction in all boroughs to which a separate court of quarter sessions should not be granted, the county justices would have been shut out by the ne intromittant clause. The effect of this part of the section therefore seems to be that, where a borough has *not* a grant of quarter sessions, the county justices shall have jurisdiction in it, notwithstanding the ne intromittant clause. The section then goes on to deal with such boroughs as *have* a grant of quarter sessions, and says that "no part of any borough, in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough, before the passing of this act, was exempt, any law &c. to the contrary notwithstanding." I do

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not see the precise object of this part of the section: I think it was intended to apply to the jurisdiction of the county justices, as justices, out of sessions. The 105th section, I confess, puzzled me a good deal. The recorder is a justice of the peace, and I thought at first that the restraining part of the proviso might apply to his original jurisdiction, as justice of the peace, in granting a licence. But I find he would not have had power, as justice of the peace, to grant a licence, for, by 9 *Geo.* 4, c. 61, s. 7, the licence could not have been granted by less than two justices of the borough. The recorder alone, therefore, never could have exercised original jurisdiction in the matter, but, if there had been an appeal to him, he could alone have exercised the appellate jurisdiction, had it not been for this proviso, so that I think the proviso is to prohibit his granting a licence on appeal. By the same proviso he is prohibited from making a county rate. By section 92, the council are to make the rate, and an appeal is given to the recorder. There again I thought the proviso of the 105th section might mean that, though he might have appellate jurisdiction in that matter, he was to have no original jurisdiction. But I think the explanation is that which my brother *Coleridge* suggests—that the recorder was prohibited from making a rate in the nature of a county rate, for this very purpose—county rates are made by the county court of quarter sessions, therefore, if the recorder had not been prohibited from making such a rate, the power which is given him of doing whatever such a court of quarter sessions may do, would have involved a concurrent jurisdiction with the county sessions or borough council.

WILLIAMS J.—I am of the same opinion. I confess I do not think there is any difficulty in this case, except from the general language of the 111th section, because the argument against this person being a party aggrieved, I listened to with attention, but I must say without conviction. I would by no means be understood to say that a party to whom a licence has been refused is not to be deemed a

party aggrieved by the judgment of the special meeting of the justices. However, to that we are not driven, because in the subsequent part of the 27th section, on which the question very much turned, before the Municipal Corporation Act, it is clear that the granting of a licence, or the transfer of a licence, is the subject-matter of an appeal. Taking it together, I cannot entertain any doubt whatever that this person was a party aggrieved within the meaning of this section; nor can there be any doubt that by the latter portion of the section the appeal must be to the quarter sessions of the county within which the borough is situate, and therefore up to that point the case is entirely without doubt.

Then the question as to the jurisdiction of the recorder, when understood, is, in my opinion, in favour of the appeal to the quarter sessions; because, unless you retain the original jurisdiction of the quarter sessions, given by the 27th section of the 9 *Geo.* 4, the party in this case is without any appeal at all. The 105th section clearly takes away all power from the recorder, in his judicial capacity, of interfering at all with appeals against the refusal of justices to license. Therefore, unless you retain the jurisdiction of the county sessions, there certainly is no appeal whatever. But it was said that the 111th section, being an enactment posterior to sect. 27 of 9 *Geo.* 4, c. 61, and contrary to it, must be considered as overriding the former enactment. Undoubtedly, if the latter enactment had been expressly contrary to the former, it would be very difficult to meet that argument. However, it seems to me that the general words so much relied upon at the end of the 111th section, "that no part of any borough in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough, before the passing of this act, was exempt," may very well be understood by applying the words "the jurisdiction of the justices," to their ordinary jurisdiction alone, and not to their appellate jurisdiction

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in quarter sessions. For these reasons I think the appeal was properly entertained by the court of quarter sessions for the county.

COLERIDGE J.— I am entirely of the same opinion. With regard to the point made on 9 *Geo.* 4, c. 61, s. 27, I do not desire to add anything to what has been already said, nor do I think it necessary to say any thing upon the difficulty suggested upon the 105th section of the Municipal Corporation Act. I think that has received a complete answer; and I agree with my brother *Williams* that the 105th section, when understood, is an argument rather in favour of the present appeal than against it. With respect to the 111th section (in the construing of which, in truth, the only difficulty lies), I will add one word: If I thought that our interpretation at all forced the meaning of the plain words of the enactment, I should not be disposed to concur in the judgment of the Court, for the longer I sit here, the more impressed I am with the importance of seeking the meaning of an act of parliament by a fair interpretation of the words used in it, and by acting upon them, whatever the consequences may be. But I own it appears to me that this 111th section, (taking the words used in it according to their fair and reasonable interpretation,) is not at all inconsistent with the 9 *Geo.* 4, c. 61, s. 27. Take the 111th section from the beginning, and see what it is that the legislature is about. “The justices assigned or hereafter to be assigned to keep the peace in and for the county in which any borough is situated, to which his majesty shall not have granted that a separate court of quarter sessions of the peace shall be holden in and for the same, shall exercise the jurisdiction of justices of the peace in and for such borough.” Now what is meant by “exercising the jurisdiction of justices of the peace in and for such borough”? It is quite clear that it is meant “*other than the duty of holding quarter sessions in that place, or doing any act that could*

be done by a court of quarter sessions in that place;" for the section is speaking of a borough to which his majesty shall *not* have granted a separate court of quarter sessions. The words, "the jurisdiction of justices of the peace," clearly therefore refer in that part of the section to acts done by one or more justices out of sessions, and, that being so, it goes on to say, "and no part of any borough in and for which a separate court of quarter sessions of the peace shall be holden, shall be within the jurisdiction of the justices of any county from which such borough, before the passing of this act, was exempt." Then take the words, "jurisdiction of the justices of any county," and understand them with reference to the same words, used only two or three lines before, and it is clear that they have reference again to the acts of one or more justices, not acting in the court of quarter sessions, and without the least reference to such acts as can only be done by a court of quarter sessions. As therefore the 9 *Geo.* 4 has reference only to an act done by the quarter sessions, the two enactments are *diverso intuitu*, and cannot be inconsistent with each other.

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Order of Sessions confirmed (a).

(a) As to the jurisdiction of county and borough justices since the passing of 5 & 6 *Will.* 4, c. 76, see *Reg. v. The Justices of Salop*, *ante*, 146.

D.



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*Saturday,
June 13th.*

The QUEEN v. SHILES and others.

A footpath led from the hamlet of Wyke to a turnpike road which led in one direction to the town of Axminster, and in the other to various other places. It was proposed to divert a part of this footpath, by making it join the road at a point somewhat nearer to Axminster.

Two justices certified (under the 5 & 6 Will. 4, c. 50, s. 85), for the diversion of this footpath, described as leading "from W. to A.," and stated in their certificate that the intended footpath was "nearer and more commodious" than the old.

Against this diversion an appeal was tried at the quarter sessions, under section 88, and the grounds of appeal were, that "reference being had to the various places with which the original footpath communicated, the new line was not nearer and more commodious than the old."

It appeared that the proposed new line of footpath joined the turnpike road at a point nearer to Axminster than the old, and was consequently nearer as between Wyke and Axminster only, but that it was not so near as between Wyke and the other places mentioned.

Held, 1. That the jury were properly directed to construe the word "nearer" not as between W. and A., but as between the point at which the new and old lines of footpath diverged, and the point where the old line reached the road.

2. That the jury having found that the new path was *not* nearer than the old, but that it was more *commodious*, the order for diverting the footpath could not be made, as it was necessary, under section 89, that the substituted line should be both "nearer" and more "commodious."

THIS was a case stated specially, under the 108th section of the General Highway Act (5 & 6 Will. 4, c. 50), upon an appeal against the diverting and stopping up the old line of a footway.

In the certificate of the two justices for this diversion, according to section 85 of the act, the footway was described as leading "from the hamlet of Wyke to the town of Axminster," in the county of Devon; and the justices certified "that the proposed new line or branch of the said highway or footway is nearer *and* more commodious to the public; that is to say, that by the proposed new line, commencing &c., it will be 80 yards nearer, between the said hamlet of Wyke and the centre of the said town of Axminster, than by the said old part of the highway or footway, commencing &c., and that the new line would be more commodious to the public by reason of the new ground being firmer and cleaner" &c.

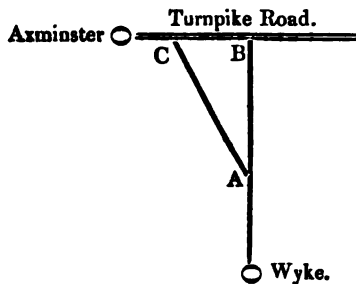
The appellants gave the following statement of grounds of appeal, in their notice of appeal, according to section 88 of the act:—"That, reference being had to the different towns, parishes, farms, mills, roads, and places with which the said original part or branch of such highway or footway communicates, the said new line or branch of the said high-

way or footway proposed, or intended to be substituted in lieu thereof, is not nearer *and* more commodious than the said original part or branch of such highway or footway intended to be diverted, turned, and stopped up."

A jury was impannelled to try this appeal at the quarter sessions, under section 89 of the act, by which it is enacted that "if, after hearing the evidence before them, the said jury shall return a verdict that the proposed highway is nearer *or* more commodious to the public, *or* that the public highway so intended to be stopped up, either entirely or subject as aforesaid, is unnecessary, *or* that the party appealing would not be aggrieved, then the said Court of Quarter Sessions shall *dismiss* such appeal, and make the order herein mentioned for diverting and turning and stopping up such highway, either entirely or subject as aforesaid, &c.; but, if the said jury shall return a verdict that the proposed new highway is not nearer, *or* not more commodious to the public, *or* that the highway so intended to be stopped up, either entirely or subject as aforesaid, is not unnecessary, *or* that the party appealing would be injured and aggrieved, then the said Court of Quarter Sessions shall allow such appeal, and shall not make such order as aforesaid."

It appeared at the trial that the path in question led from Wyke into a turnpike road leading on the one hand to Axminster, and on the other from that town to various places; that the proposed new line, leaving the old footway at the point A. proceeded to join the said turnpike road at a point C. nearer to Axminster than the point B. at which the old line joined the same turnpike road. The turnpike road led to several places in the direction away from Axminster. The new line A. C. afforded a nearer way by eighty yards, from Wyke to Ax-

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minster, than the old line, but did not afford so near a way from Wyke to the other places mentioned.

The chairman left two points for consideration: first, whether, regard being had to the points A. and B., the new line A. C. B. was or was not *nearer* than the old line A. B.; secondly, whether the new line was or was not more *commodious* than the old.

The jury found, first, that the new line was *not nearer* than the old; secondly, that it *was* more *commodious* to the public.

The Court of Quarter Sessions dismissed the appeal, and made the order for diverting and stopping up the path, subject to a case in which the above facts were set out, and the following points were submitted to this Court:

1. Whether, upon the finding of the jury, the respondents or appellants were entitled to judgment.

2. Whether the chairman was right in directing the jury, on the first issue, to confine their attention to the distance between the point A., where the proposed diversion commenced, and the point B., where it ended, by the new and old lines respectively; or whether the proper question for the jury, on that issue, was not the comparative distance by the two lines, as between Wyke and Axminster.

If the respondents were entitled to judgment on the verdict as it stands, then the order of sessions to be confirmed. If the appellants, then the appeal to be allowed, and costs to be awarded to the appellants; or if the Court should be of opinion that the proper question for the jury on the first issue was the comparative distance by the two lines, as between Wyke and Axminster, then this Court to give such judgment in the matter as to it should seem fit.

Sir *W. W. Follett* and *Merivale*, in support of the order of sessions(a). The words of the 89th section are undoubtedly irreconcilable with each other. The legislature seems to have provided only for the contingency of a single

(a) Before Lord *Denman* C.J., *Patteson*, *Williams* and *Coleridge* Js.

issue being taken before the jury: viz. whether the new road be nearer than the old, or more commodious, or whether the appellant be really aggrieved. The difficulty arises from there having been two issues taken in this case unnecessarily. Nearness is in reality only an element in commodiousness. A road may be farther about and yet more convenient for the public. It must be taken, therefore, in order to give a reasonable interpretation to the clause, that the substantial issue is as to commodiousness. The other test of nearness was added, it is submitted, merely to simplify proceedings, in case it should happen (as in many instances it would) that comparative nearness were the only question. This view of the enactment gets rid of the difficulty, and the sessions were right in dismissing the appeal on the issue as to commodiousness being found in the affirmative. [*Coleridge, J.* Suppose there had been another issue, viz. whether the appellant was aggrieved; and that had been found for him, the others against him; what would have been the effect of the verdict then?] In that case it may be admitted that the question of grievance or no grievance would be a substantial one, and, if found for the appellant, the appeal should be allowed.

But it will be contended that this difficulty is occasioned by the act of the justices, in certifying that the new road is nearer *and* more commodious; that thereby two issues are tendered in point of fact to the appellant, that he cannot let either go by, and, consequently, if either is found for him, he must succeed. But that is not so, for the appeal is really not against the certificate, but against the act of the justices in diverting the road, and neither the public nor the appellant are bound by the terms of it.

But even if it were otherwise, the decision of the chairman as to the meaning which the jury put upon the word "nearer," cannot be right. The justices who gave the certificate treated this as a path leading from Axminster to Wyke. In that sense it is, as they find it, nearer than the old one. If this be not the meaning of the act, it is obvi-

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ously impossible that the public can ever gain the benefit of any improvement by which a road is made longer, with reference to any of the places with which it communicates, however highly it may be to the advantage of the public in other respects. It will be only necessary to appeal against the diversion, on the ground that the new line is "not nearer" than the old one.

Sir *J. Campbell, A. G., Greenwood and Rowe*, contra.—The latter words of an act of parliament, according to a well known rule of interpretation, control the former, and therefore here it must be taken that, if any one of the issues left to the jury be found against the appellant, the appeal is to be allowed, and the order for stopping up the road not to be made. This is the safest rule to follow, where, as in the present instance, the latter words are plainly repugnant to the former. In this way substantial justice will be done; for if the justices choose to certify, in order to stop up a road, that the new line is nearer than the old one, with reference to certain termini arbitrarily assumed by themselves, it must be permitted to the appellant to shew that there are other places to which the old line led, and that with reference to them the distance will be increased by the new line. In such a case the appellant might be substantially aggrieved, and if aggrieved his appeal must succeed.

*Cur. adv. vult.*

Lord DENMAN C. J., on the last day of the term (June 12th), delivered the judgment of the Court.—This is an order of sessions for diverting and turning a certain foot-way, the facts being, as appears from a case stated for our opinion, as follows:—

Conformably to the 85th sect. of the 5 & 6 *Will. 4*, c. 50, two justices for the county had viewed the road, and certified that the new or intended line was nearer and more

commodious to the public than the old. Whereupon certain persons, stating themselves to be aggrieved, duly appealed to the sessions, under the 88th section; and, if that appeal had been against that certificate, we should have had no doubt that the party seeking to enforce it must have established both the allegations therein contained. That, however, is far from being the case, because, upon the matter coming before them the sessions are directed to proceed upon a new and distinct inquiry, by the aid of a jury, under the provisions of the 89th section, which are perplexed and obscure in the extreme. If we were left to conjecture what would, probably, be intended, we should conclude that both the requisites, “nearer *and* more commodious,” should be found by the jury (as in this certificate we have seen is stated), to warrant the sessions in making an order of diversion, from the gross absurdities which ensue from holding one (especially the former) sufficient.

But, however, by the beginning of the section, the jury is to determine whether the proposed new highway is nearer *or* more commodious to the public, *or* whether the party appealing would be aggrieved, and then, if upon hearing evidence, the jury shall find “that the proposed new highway is nearer *or* more commodious, *or* that the party appealing would not be aggrieved, the sessions *shall* dismiss the appeal and make the order.” That is, upon any *one* of the three alternatives being found, the thing is to be done, so far as the language literally taken is concerned, though it seems impossible to suppose that any thing like it could be meant. For instance, suppose the jury found the party appealing not aggrieved, but, as to the public, that the road was roundabout and worse. Afterwards comes the provision as to what shall *not* be done in certain events, as follows, “*but* if the said jury shall find that the proposed new highway is not nearer *or* not more commodious, *or* that the party appealing would be ag-

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grieved, the sessions shall allow the appeal, and *not make the order.*

Believing, therefore, that we are more likely to effectuate what was probably the meaning, by holding that all the requisites should concur before an order is made, and the latter words being as favourable to that construction as the earlier are to the opposite, we think (in answer to the first question) that one alternative having been negatived, the order should not have been made.

We do not see any thing erroneous in the direction of the chairman, so as to make it fit that the case should be differently submitted to another jury. It is to be observed that the old line of road, reckoning from the point where that and the intended new road diverge, did not in this instance lead to one place only, but to several different places. The extremity of the old line from such common point terminated in a public highway, and by that means branched off in different directions. This was apparent to the Court of Quarter Sessions from the maps or plans submitted to them, and since to us. We think, therefore, that under such circumstances it was quite reasonable and proper to call the attention of the jury to the distance between the said common point and the said extremity terminating in such public highway, along the old and intended line of road, in estimating the question of nearness.

Upon the whole, therefore, we are of opinion that the order of sessions must be quashed.

Order of Sessions quashed.

D.



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Friday,  
May 28th.

## LANE and others v. BURGHART.

**ASSUMPSIT.** The declaration stated that before and at the time of making the promise &c., one *A. Bacon* was a prisoner in custody for debt at the suit of the plaintiffs for 275*l.* 12*s.* &c. then due from *Bacon* to the plaintiffs, and that being such prisoner theretofore, to wit, &c. in consideration of the premises, and that the plaintiffs, at the request of the defendant, would discharge *Bacon* out of custody at their suit in respect of the said debt, the defendant promised the plaintiffs that *Bacon* should pay the debt due to the plaintiffs, together with interest, by four half-yearly instalments, the first instalment to be made on the 17th May, 1839; that the plaintiffs, confiding &c. did then, to wit, on the day and year first aforesaid, discharge *Bacon* out of custody at their suit in respect of the said debt, whereof the defendant then had notice. That although the periods appointed for the payment of the first two of the said half-yearly instalments had elapsed, before the commencement of the suit, and, although on the respective days when the said two instalments became due, *Bacon* was requested by the plaintiffs to pay the same, he did not nor would pay the same or any part thereof, whereof the defendant afterwards, to wit, on &c. had notice and was then requested by the plaintiffs to cause and procure *Bacon* to pay the said last-mentioned instalments; that the defendant had disregarded his promise &c. and the same instalments remained due &c.

Pleas:—1. Non-assumpsit. 2. That *Bacon* was not a prisoner in custody for debt at the suit of the plaintiffs. 3. That the plaintiffs did not discharge *Bacon* out of custody at their suit. 4. To so much of the declaration as related to the first of the said instalments, a general plea of defendant's bankruptcy &c. in the ordinary form. 5. To so much as related to the second instalment a similar plea.

At the trial before *Williams J.* at the Middlesex sittings in Easter term 1840, the facts were admitted to be that

The defendant, against whom a fiat of bankruptcy issued on the 19th April, 1839, and who obtained his certificate on the 6th of August, 1839, gave the following undertaking to the plaintiff, on the 17th Nov. 1838:—

"In consideration of your discharging *B.* out of custody (who had been taken under a ca. sa. at the suit of the plaintiff), I undertake *he* shall pay the debt due to you by four half-yearly instalments, the first to be paid on the 17th May, 1839." On this *B.* was discharged.

Held, that the certificate of the bankrupt was a bar to an action for the two first instalments, because, *B.* having been discharged from the debt, this was an original undertaking on his part to pay by the hand of *B.*

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*Bacon* was in execution on a ca. sa. at the suit of the plaintiffs, and that he was discharged from custody by them on the receipt of the following undertaking of the defendant addressed to the plaintiffs :—

LANE and others v. BACON.

Gentlemen,

November, 17th, 1838.

In consideration of your discharging the defendant out of custody in this action, I undertake that he shall pay the debt due to you, viz. 275*l.* 12*s.* together with interest, by four equal half-yearly instalments, the first instalment to commence and be made on the 17th day of May, 1839.

(Signed) *F. Burgart* :

that a fiat of bankruptcy issued against the defendant on the 19th April, 1839, under which he was declared bankrupt, and subsequently, on the 6th August following, obtained his certificate. On this it was contended, for the defendant, that the discharge of *Bacon* from custody discharged him from the debt, and that the defendant's undertaking was consequently an original one, and was proveable under the 6 *Geo.* 4, c. 16, s. 51, and *Goodman v. Chace* (a) was cited. The learned judge thought that the amount which the defendant would have to pay was at the time of the fiat uncertain, and incapable of being ascertained without the intervention of a jury, and that therefore it was not proveable; he directed a verdict for the plaintiffs for the amount of the two instalments with interest, giving leave to move for a nonsuit.

*Cowling*, in the same term (May 4th), having obtained a rule nisi accordingly,

*Kelly* and *Miller* now shewed cause in this term (b). The defendant's certificate was no bar, unless the amount of the two instalments was proveable under his commission. The only section of the Bankrupt Act, 6 *Geo.* 4, c. 16, the other side can rely on, is the 56th, which enables a

(a) 1 B. & Ald. 297.

*Patteson, Williams, and Coleridge*

(b) Before Lord Denman C. J., *Js.*

creditor to prove for "a debt payable on a contingency." But no debt, contingent or otherwise, was due here. The defendant did not become a surety for *Bacon's* debt, but undertook that *Bacon* should pay it. Neither debt nor indebtedness *assumpsit* would lie on such an undertaking against the defendant. On failure to perform the contract the plaintiffs could sue for unliquidated damages only, averring in the declaration that *Bacon* had not paid. Again, if it be a collateral undertaking to pay in default of *Bacon*, that is not a debt proveable under the fiat, because the contingency of such default is not susceptible of valuation: *Atwood v. Partridge* (a), *Thompson v. Thompson* (b), *Ex parte Marshall* (c), *The Overseers of St. Martin in the Fields v. Warren* (d), *Hoffham v. Foudrinier* (e), *Yallop v. Ebers* (f), *Ex parte Thompson* (g). In *Ex parte Myers* (h) the undertaking was at once original and collateral. The defendant's undertaking was merely a guarantee, which these cases shew is not proveable until default of the principal.

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Sir J. Campbell A. G. and *Cowling* contra. By the discharge of *Bacon* the debt due from him was extinguished, and the defendant's undertaking became an original one for a valuable consideration (i). The case is the same as if the defendant promised that *John Stiles* or any third person should pay it; that it should be paid by a good bill of exchange or in any particular manner; in other words, that the defendant would cause it to be paid or would pay it himself. *Bacon* was merely the hand by which it was to be paid. If this be so, the case clearly falls within the 6 Geo. 4, c. 16, s. 51, being debitum in presenti solvendum in futuro, and was proveable under the fiat, making an allowance for interest in the manner there pointed out. This was the ground taken at the trial, and the defendant has never re-

(a) 4 Bingham 209.

(b) 2 B. N. C. 168.

(c) 2 Dea. &amp; Ch. 589.

(d) 1 B. &amp; Ald. 491.

(e) 5 Mau. &amp; S. 21.

(f) 1 B. &amp; Ad. 698.

(g) 2 Dea. &amp; Ch. 126.

(h) 2 Dea. &amp; Ch. 251.

(i) 1 Wms. Saund. 211 a,  
note (c).



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ferred to the 56th section, against which the whole of the argument for the plaintiffs has been directed.

Even if *Bacon* were not absolutely discharged the case would still fall within the 51st section, for there was "a credit" and "a security" within its meaning. The discharge of *Bacon* from custody on the receipt of the undertaking was a giving credit within the meaning of the bankrupt laws: *Macarty v. Barrow* (a). It is immaterial that there might be another and a principal debtor, *Bacon*, there would still be a credit to the defendant, just as a credit is given to the drawer and all the indorsers of a bill of exchange, though the person principally liable is the acceptor, and the other parties cannot be called on until his default, and yet they by sect. 51 are all discharged by their certificates, although the bill may not have been due at the dates of their fiats. There could be no substantial distinction between this case and that of a bill for the same amount and payable at the same times, drawn by the defendant on and accepted by *Bacon* in favour of and given to the plaintiffs. If "bills" and "notes" are specifically enumerated in section 51, so are "securities." The assertion, that guarantees are never proveable until default of the principal, seems unfounded. "Guarantee" is an ambiguous term: a guarantee to pay all that *J. S.* shall not pay would certainly not be proveable, because it is in the nature of a contract of indemnity, which it may be admitted is not proveable until default, but a promise that a sum shall be paid at a certain time, whether another is also liable to pay it or not, is a species of original promise, in which credit is as much given to the guarantor as to the drawer of a bill of exchange, and he equally ought to be discharged by bankruptcy and certificate. In fact, the difference between a guarantee and a note or bill on this point is often nominal: thus in *Jarvis v. Wilkins* (b) it made no difference whether the document was a note or guarantee as to the promise, which is the only thing mate-

(a) 2 Str. 949; *S. C.* 7 East, 437, note (a); 1 Dec. Bank. Laws, 96. (b) 7 M. & W. 410.

rial here, though it did make a difference there as to the consideration. The authorities cited are very distinguishable. *Thompson v. Thompson* (a) was decided on the 54th section; so was *Atwood v. Partridge* (b), and indeed did not go as far as *Bennett v. Burton* (c). *The Overseers of St. Martin v. Warren* (d) was a contract of indemnity, and so were *Yallop v. Ebers* (e) and *Hoffman v. Foudrinier* (f).

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*Cur. adv. vult.*

Lord DENMAN C. J., on a subsequent day in this term (June 10th), delivered the judgment of the Court.—The question was whether the defendant's certificate as a bankrupt was a bar to the plaintiffs' recovery on a contract to the following effect. [His lordship stated the contract.] *Bacon* was at this time in custody under a ca. sa. for the debt in question, and, as that was entirely discharged by the execution, and he could no longer be sued for it, or make default in respect of it, it was argued, on the authority of *Goodman v. Chace* (g), that this undertaking was an original one on the part of the bankrupt to pay the amount of the sum that had been due from *Bacon*, and, though in form it was an undertaking that *Bacon* should pay, yet at most it was an undertaking by the defendant to pay by the hand of *Bacon*. On consideration we agree that this is correct: the unpaid instalments might therefore have been estimated and proved under the commission. It follows that the defendant's certificate is a bar to the action.

Rule absolute.

(a) 2 Bing. N. C. 168.

(b) 4 Bing. 209.

(c) 4 P. & D. 313.

(d) 1 B. & Ald. 491.

(e) 1 B. & Ad. 698.

(f) 5 Mau. & S. 21.

(g) 1 B. & Ald. 297.



1841.

Tuesday,  
June 1st.

PAUL v. JAMES.

Ely Place, part of the Liberty of Saffron Hill, Hatton Garden, and Ely Rents, is private property, and though it is generally open to the public during the day, has never been dedicated to the public:—Held, that the commissioners for paving Saffron Hill, Hatton Garden, and Ely Rents had no authority to enter for the purpose of paving it, under 5 W. 4, cap. xviii. s. 44, which empowers them at all times to pave, &c. all the squares, streets, lanes, courts, ways, footways, or carriage-ways, passages and places within the liberty.

**TRESPASS** for assaulting the plaintiff and endeavouring to wrest a pickaxe from him.

Pleas:—1. Justifying as the servant of *John Carr*, seised of a close called Ely Place, that plaintiff, without the license of the said *John Carr*, was endeavouring to dig up with a pickaxe a flagstone, part of the pavement of Ely Place, and because the plaintiff refused to desist on request, defendant, as *Carr's* servant, endeavoured to prevent plaintiff, and in so doing committed the trespass, &c. 2. As the servant of *William Hodges*. 3. As defending his own possession of Ely Place. 4. Defendant alleged himself to be possessed of a messuage, with a private way appurtenant thereto over Ely Place, and, because plaintiff was obstructing the said way, the defendant endeavoured to prevent him, and in so doing, &c.

The replication to the first plea stated that Ely Place was a paved way and place within the limits of the local paving and lighting act, 5 Will. 4, cap. xviii., and was within that part of the Liberty of Saffron Hill, Hatton Garden and Ely Rents, which had not been paved, lighted, and cleansed by virtue of the London Paving Act, 8 Geo. 3, c. 21, and was and had been within and under the jurisdiction and control of the commissioners for paving and improving the Liberty of Saffron Hill, in the county of Middlesex, and that, by reason of the premises and of the statutes in that case made and provided, the sole power and superintendence of the paving, repairing, cleansing, lighting, watching, improving, &c. the said Ely Place, so being such paved way, had been and was vested in the said commissioners above mentioned, and that plaintiff, being surveyor to the commissioners, by their command, entered into Ely Place to carry the purposes of the said act (5 Will. 4, cap. xviii.) into execution, viz. to pave and repair the said paved way, and, in so doing, the plaintiff en-

deavoured to dig up the pavement with the pickaxe, &c. when the defendant committed the trespass, &c.

The replications to the other pleas were in substance the same.

The rejoinder to the replication to the first plea, after an inducement to the effect that Ely Place was and always had been a private way and place, and repaired by and at the sole expense of the several owners and occupiers for the time being of certain lands, messuages and hereditaments adjoining and near thereto, by rateable contributions, made and agreed upon by and amongst themselves from time to time, and had never been a public paved way or place within the meaning of the said act, *5 Will. 4, cap. xviii.*, and had never been paved or repaired by the public, and had never been dedicated to the public for public use as a way or passage, and had not become nor been used as a public or common highway, concluded with a special traverse that Ely Place was or had been a paved way and place within the limits of the local paving act, *5 Will. 4, cap. xviii.*, or within that part of the Liberty of Saffron Hill, Hatton Garden, and Ely Rents, which had not been paved, lighted, and cleaused by virtue of the London Paving Act, *8 Geo. 3, c. 21*, or was and had been within and under the jurisdiction and control of the said commissioners for paving and improving the Liberty of Saffron Hill, in the county of Middlesex, in manner and form as alleged in the replication, and concluded to the country, &c.

The other rejoinders were similar in substance.

The surrejoinders joined issue thereon.

The cause came on to be tried before Lord *Denman* C.J. at the sittings for Middlesex after Michaelmas term, 1838, when a verdict was found for the plaintiff, subject to the opinion of the Court upon a case.

The case stated the provisions of several acts of parliament (which so far as they are material to the case are referred to in the argument), and proceeded to describe

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the place in which the alleged trespass was committed in the following manner.

The parish of St. Andrew, Holborn, is divided into three districts, known and distinguished by the following names, viz. the parish of St. Andrew, Holborn, in the city of London; the parish of St. Andrew, Holborn, above Bars, in the county of Middlesex; the Liberty of Saffron Hill, Hatton Garden and Ely Rents, in the parish of St. Andrew, Holborn, in the county of Middlesex. Each of these districts has separate overseers and separate commissioners for paving and lighting, and they are separate districts with respect to the relief and maintenance of the poor.

Ely Place is situated within and is part of the Liberty of Saffron Hill, Hatton Garden, and Ely Rents, and is within that part of the metropolis which is included within the weekly bills of mortality. It had not at the time of the passing of the local act, 5 *Will.* 4, cap. xviii., been paved, lighted, and cleansed by virtue of the said act, 8 *Geo.* 3, c. 21, and is not, unless subject to the controul of the commissioners of the pavements appointed under the local act, 5 *Will.* 4, subject to the control of any commissioners, trustees, or other persons having the control of the pavements under an act of parliament.

The site of Ely Place, previous to 1772, belonged to the bishopric of Ely, and the bishop's palace, called Ely House, then stood upon it; but in that year, 1772, the ground, with the palace which had become ruinous, and all erections thereon, were, by an act of parliament, 12 *Geo.* 3, c. 43, vested in the crown for public purposes. In the year 1776 the same ground and premises were by 17 *Geo.* 3, c. 33, vested in the commissioners of his Majesty's treasury or the lord high treasurer for the time being, upon certain trusts therein mentioned, and were afterwards, in pursuance of such trusts, by lease and release of the 18th and 19th of November, 1776, conveyed to the use of *Charles Cole* in fee. Soon after this conveyance, Ely

House, and other buildings on the premises, except Ely Chapel, which is still standing there, was pulled down, and the present Ely Place was erected on the site.

The principal entrance to Ely Place is from Holborn, on the south side of Ely Place.

There is a row of houses, consisting of twenty-two in number, extending from south to north, along the east side of Ely Place, and there is another row, consisting of twenty houses and also the old chapel, extending in like manner along the west side thereof.

There is in front of each row of houses a footpath, and between the footpaths a carriage-way from the south to the northern extremity of the place.

The footpaths are paved with flagstones in the usual manner, and the carriage-way gravelled, and they were so respectively paved and gravelled soon after the time when the palace was removed, and the houses in Ely Place built; and have been so paved and gravelled ever since at the expense of the owners and occupiers of houses in Ely Place, and have never been repaired by the public, and have never been in any manner dedicated to the public use.

At the Holborn entrance to Ely place there is a gateway for carriages, and another for foot passengers, having respectively gates therein.

There were wooden gates in the same place while Ely House stood, and, in the interval of time between the removal of them and the erection of the present gates, a wooden bar was kept across the same place. At these gates porters, employed and paid by subscription among the inhabitants of Ely Place, have been stationed by day and night, and the gates have always been shut at night, during which time Ely Place has been guarded by watchmen employed and paid in like manner by the inhabitants of Ely Place.

On the western side of Ely Place, about half-way up, there is a foot passage, called Mitre Court, leading from Ely Place into Hatton Garden. Across this passage, at the end adjoining Hatton Garden, is also a gate opening

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inwards to Ely Place, kept closed at night by a private watchman employed and paid by the inhabitants of Ely Place.

At the northern end of Ely Place there was formerly a gateway, leading from Ely Place through a yard called Bleeding Heart Yard into a street called Charles Street, which street is a public thoroughfare. This gateway was erected in the place where the back gates to the bishop's palace had stood. This gate was shut or open as the inhabitants of Ely Place thought fit; the inhabitants had keys to it, and some of them used this gateway as a way to the stables occupied by them in Bleeding Heart Yard. When the gate was open persons could and did pass by this gateway between Bleeding Heart Yard and Holborn, but for the last forty or fifty years this passage has been closed up altogether.

Except at the first-mentioned gateway from Holborn and the passage through Mitre Court before mentioned, Ely Place is closed on all sides, and can only be entered through one of the last mentioned gateways or passages.

The public have no right of way through the gateways or passages, or over the carriage way or footpath in Ely Place, but the gates have been generally kept open during the day, during which period the public have been accustomed to go in and out, and in so doing to use the footpaths; but the inhabitants have closed those gates in the day time whenever they thought fit, and have been used to close them particularly during the days of cattle markets in Smithfield, and on occasions of public executions at Newgate, and the porters employed by the inhabitants have been accustomed to drive out beggars, collectors of old clothes and other objectionable people.

Since the year 1835 the inhabitants of Ely Place have regularly been rated to the relief of the poor for the said liberty, and have regularly paid the same. The inhabitants of Ely Place have also paid sewers rates.

Previously to the passing of the local act, 5 *Will.* 4, the

owners and inhabitants of Ely Place voluntarily paved, gravelled and repaired it as before mentioned.

After the passing of that act, viz. in November, 1836, and before the trespass in the declaration mentioned, the commissioners for paving and improving the liberty of Saffron Hill, Hatton Garden and Ely Rents under the said act gave notice of their intention after the ensuing Christmas to enter Ely Place, and take upon themselves the future lighting, cleansing, repairing and improving of it under and by virtue of the said last mentioned act and the said act of 57 Geo. 3.

On the 18th July, 1837, the plaintiff, who was and still is the surveyor to the said commissioners, by their order entered Ely Place in pursuance of such notice, claiming under the said commissioners a right to repair the pavement of the footpaths therein, and was digging up a flagstone of one of the said footpaths therein for that purpose as mentioned in the replication, on which occasion the defendant committed the assault set forth in the declaration upon the plaintiff refusing to desist from digging up such flagstone.

Either party was to have liberty to refer to the pleadings.

The question for the opinion of the Court is, whether Ely Place or the said footpath therein last mentioned, at the time when the said trespass was committed, was a paved way or place within and under the jurisdiction and control of the said commissioners for paving and improving the liberty of Saffron Hill in the county of Middlesex, as alleged in the replication.

If the Court shall be of opinion that Ely Place or the said last mentioned footpath therein was at the said time when, &c. a paved way or place within and under the jurisdiction and control of the said last mentioned commissioners, then the verdict is to be entered for the plaintiff as aforesaid; but, if the Court shall be of a contrary opinion, then a nonsuit is to be entered.

Sir J. Campbell, A. G. for the plaintiff. The right of the

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plaintiff to enter Ely Place for the purpose of paving it seems to depend on 5 *Will.* 4, c. xviii. (local, personal and public); for the 57 *Geo.* 3, c. xxix. (local, personal and public, the General Metropolitan Paving Act) seems to apply to such streets and places only as are public. The 5 *Will.* 4, c. xviii. is intituled "An Act for Paving, Cleansing, Lighting and regulating the several Parishes of St. Margaret, St. John the Evangelist, and St. James within the Liberty of Westminster in the County of Middlesex, and the Precinct of the Savoy, and also part of the Liberty of Saffron Hill, Hatton Garden and Ely Rents within the same county, and for other purposes therein mentioned." By section 12 the inhabitants, who have a right to assemble in vestry for that part of the liberty of Saffron Hill, Hatton Garden and Ely Rents, which has *not* been paved, lighted and cleansed under 8 *Geo.* 3, c. 21, are required to meet in vestry to elect commissioners for the purposes of the act. The inhabitants therefore are represented by these commissioners. This section applies to the locus in quo, for it is stated in the case that it had not been paved, &c. under 8 *Geo.* 3, c. 21. The powers of the commissioners to enter private streets for the purpose of *paving*, is shown by their power (under sect. 28) to enter and *light* the same. Section 28 enacts, "that it shall be lawful for the said commissioners in each of the said parishes, precinct and liberty to cause the several squares, streets, lanes, courts, ways, footways, carriage ways, passages and *places* within such parish, precinct or liberty, or such of them as they shall from time to time think proper, to be well and sufficiently lighted at such times and in such manner as they shall direct; and it shall be lawful for the said commissioners to provide and set up lamps and other apparatus, and works necessary for the purposes of such lighting, and also to affix, carry or place any such lamp or works to, upon or against *any* buildings or premises," &c. Section 29 qualifies the above power to a certain extent, by enacting that the commissioners shall not carry any gas

pipes through or into private premises without consent of the occupiers. The commissioners therefore may enter and light streets which are not strictly public; and, by section 44, it is submitted that their authority to pave is co-extensive with their authority to light. That section empowers them "in the several parishes, precinct and liberty from time to time and at all times hereafter to *pave*, macadamize or otherwise make, keep, repair and alter all the squares, streets, lanes, courts, footways or carriage ways, passages and *places* within the parishes, precinct and liberty for which they may be appointed, or which may be placed within their jurisdiction by virtue of this act (except as herein is excepted) and cleanse, *light* and water and regulate the *same* in such manner as they shall think fit: provided always, that it shall not be lawful for the commissioners for executing this act to macadamize the carriage ways of any street or *place* within their jurisdiction without requisition first made to them to do so," &c. It appears that "*place*" here is used advisedly to indicate private streets; for by section 39 the commissioners may "alter the level of any street or *public place*, and the form of the pavement or the materials with which the same is or shall be paved or otherwise made or formed." The description of "*public places*" is used also throughout the 54th section of 57 *Geo. 3*, c. xxix.; the present act, therefore, enlarges the jurisdiction of the paving authorities. Section 45 of the present act furnishes a strong argument for the plaintiff; it enacts, "that it shall be lawful for the said commissioners in each of the said parishes, precinct and liberty, and they are hereby required from time to time as occasion shall require, to make one or more rate or rates, &c. for defraying the expense of carrying into execution the several purposes of this act, upon every person and persons, tenant or other person who do or shall inhabit, hold, use, occupy, &c., or may otherwise under or by virtue of this act be liable to be rated or assessed for or in respect of any land, ground, house, shop, &c. within each of the said parishes, precinct and liberty, and all other

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streets and places hereinbefore declared to be within the jurisdiction of this act." Under this section the commissioners have power to rate the inhabitants of Ely Place; they must have, therefore, power to pave the street. Although the street has never been dedicated to the public, and the inhabitants have a right to exclude the public generally, yet they cannot under the Paving Act exclude those who seek to enter for the purposes of the act. It would be most inconvenient if any street, in the heart of London, like Ely Place, merely because it has not been dedicated to the public, might at the will of the inhabitants be kept unpaved and in darkness.

Sir *W. W. Follett*, *contrà*, was not heard.

Per CURIAM (a).—There is no doubt at all that Ely Place, as described in this case, is still a private place, and not within the jurisdiction of the paving commissioners.

D.

Judgment for the plaintiff.

(a) Lord Denman C.J., *Patteson, Williams and Coleridge Js.*

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The QUEEN v. The BIRMINGHAM and GLOUCESTER  
RAILWAY COMPANY.

*Wednesday,*  
*June 2d.*

By 6 Will. 4,  
 c. xiv. s. 29,  
 the Birmingham and

A RULE to shew cause why a mandamus should not issue, commanding the defendants to restore a turnpike

Gloucester Railway Company were authorised, subject to the restrictions of the act, to make across the railway such roads "as they should think proper."

By s. 41, when any part of any road, either public or private, should be cut through, raised, sunk, "taken," or so much injured by the company as to be impassable or inconvenient, the Company, before any such road should be so cut through, raised, &c. were to cause another road to be set out and made instead thereof, as convenient as the said road so cut through, raised, &c., or as near thereto as might be; and where the road cut through, raised, &c. should be a turnpike road, the substituted road, if temporary, was to be set out and made, and the principal road to be restored within six months after commencing the operation.

By s. 47, where any bridge should be erected for carrying any turnpike road, public highway or occupation road over the railway, the road over such bridge was not to be less than fifteen feet.

A mandamus, reciting that the Company had, in November, 1838, (after a compul-

road which they had carried over their railway, under the provisions of 6 Will. 4, c. xiv. (local, personal and public), was argued in Easter term, 1840 (May 10(a)), by Sir J. Campbell A. G. and Greaves, in support of the rule, and by Sir W. W. Follett and Selfe for the defendants.

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*Cur. adv. vult.*

In Trinity term, 1840 (June 14),

Lord DENMAN C. J. delivered the judgment of the Court.—The question in this case was, whether a mandamus lies to this Company, directing them to restore a turnpike road, carried over a railway, to its former width. *Primâ facie* they are bound to make the road so lifted over the railway as wide as it was before, though there is a provision that the *bridge* in such a case shall be 15 feet wide, dispensing, no doubt, with any greater width in that part. But we are clearly of opinion that this minimum is confined to that part of the road which can strictly be called the bridge, and can by no means import into this case the doctrine laid down, with an entirely different object, that the approaches to a bridge form a part of it, by which the road might be

(a) Before Lord Denman C. J., Littledale, Patteson and Williams Js.

sory power given to the Company of taking land had expired,) cut through and taken part of a turnpike road, which was 40 feet wide, and had made a bridge thereon for carrying it over the railway, the said bridge and the approaches (which were about 150 yards long on either side of the bridge) being about 30 feet wide only, commanded the Company to restore the turnpike road according to the said act.

The Company returned, 1. That they had not "cut through and taken" the said part of the turnpike road within the meaning of the act. 2. That the Company had judged it necessary to erect the bridge to carry the road over the railway, and had made the bridge of a greater width than required by the act. 3. That it was necessary, in consequence of the erection of such bridge, to make approaches also, and that they had made the approaches as *convenient* to the public as they could be made, in execution of the powers of the act, and as convenient to the public as the original road was. 4. That they were not authorised to injure any house, unless specified in the schedule of the act or omitted by mistake, without consent; that they could not obey the writ without injuring houses neither specified nor omitted by mistake. 5. That they could not obey the writ without taking more land, and that their compulsory power to take land had expired before they were required by the trustees of the road to widen it.

Held, 1. That section 41 was not confined to the case of a turnpike road becoming impassable by the works of the Company, and of a temporary road being substituted during such interruption, and that they had "taken" the road within the meaning of the section.

2. That the return was bad; and a peremptory mandamus was issued, commanding the Company to restore the approaches to their former width.

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narrowed to a great extent beyond the bridge on either side. It was argued that no actual inconvenience is said to have resulted from what has been done: but this cannot be necessary in a case like the present.

Rule absolute.

The writ issued accordingly, and after reciting that the Company was incorporated by the above act for the purposes therein specified, proceeded thus:—

“ And by the said act (sect. 29) it was further enacted, that for the purposes, and *subject to the provisions and restrictions of the said act, it should be lawful for the said Company*, their agents and workmen, and all other persons by them authorised, and they were thereby empowered, to enter into and upon the lands of any corporation or person whatsoever, and to survey and take the levels of the same, or any part thereof, and to set out and appropriate for the purposes of the said act such parts thereof as they were by that act empowered to take or use, and in or upon such lands, or any lands adjoining thereto, to bore, sink, dig out, and embank, and sough, and to remove or lay, and also to use, work and manufacture any earth, stone, rubbish, trees, gravel or sand, or any materials or things which might be dug or obtained therein, or otherwise, in the execution of any of the powers of that act, and which might be proper and necessary for making, maintaining, altering, repairing, or using the same respectively, according to the true intent and meaning of that act; and also, for the purposes of and according to the provisions of that act, to make or construct in, upon or across, or under the said railway or other works, or any lands, streets, hills, valleys, roads, railroads or tram-roads, rivers, canals, brooks, streams, or other waters, *such inclined planes, tunnels, embankments, aqueducts, bridges, roads, ways, passes, conduits, drains, piers, arches, cuttings, and fences, as the said Company should think proper*; and also to alter the course of any rivers, canals, brooks, streams, or watercourses, during such time as might be necessary for

constructing tunnels, bridges or passages over or under the same, and also to divert or alter the course of any roads or ways, or to raise or sink any roads or ways, in order the more conveniently to carry the same over or under, or by the side of the railway.

“ And by the said act (sect. 41) it was provided and further enacted, that in all cases, wherein, in the exercise of any of the powers thereby granted, any part of any carriage or horse road, railway or tram road, either public or private, should be cut through, *raised* and sunk, *taken*, or so much injured as to be impassable or inconvenient for passengers or carriages, or to the persons entitled to the use thereof, the said Company should, at their own expense, before any such road should be so cut through, raised, sunk, taken or injured as aforesaid, cause another good and sufficient road (as the case may require) to be set out and made instead thereof, as convenient for passengers and carriages as the said road so cut through, raised, sunk, taken or injured as aforesaid, or as near thereto as might be, and where the road cut through, raised, sunk or injured should be a turnpike road, *the substituted road, if temporary, should be set out and made, and the principal road should be restored within six calendar months after the commencement of the operation.*

“ And by the said act (sect. 47) it was further enacted, that where *any bridge should be erected* for carrying any turnpike road, public highway, or occupation road, *over the said railway*, the road over such bridge should be formed, and should at all times be continued, *of such width* as to have a clear and open space between the fences of such road of not less than 15 feet, and the ascent of every such bridge, for the purpose of such turnpike road, should not be more than 1 foot in 30 feet, and for the purposes of any public highway, not being a turnpike road, not more than 1 foot in 20 feet, with respect to any private carriage or occupation road, not more than 1 foot in 13 feet, and a good and sufficient fence should be made on the side of every such bridge,

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which fence should not be less than 4 feet above the surface of such bridge.

"And whereas we have been given to understand &c., that you the said Company, in execution of the powers of the said act, and for the purposes thereof, have cut through and *taken* a certain part of a certain turnpike road, and leading from the bottom of the High Street in the town of Cheltenham, in the county of Gloucester, to Tewkesbury, in the same county, near to a certain place called the Moors, in the parish of Cheltenham aforesaid, such part of the said turnpike road, so cut through and taken by you as aforesaid, then being of the width of 40 feet between the fences, that is to say, 29 feet in width thereof, then being maintained as a hard road for carriages, and the remaining 11 feet thereof then being used and maintained as a raised footway for the convenience of foot passengers, and that you have also caused to be erected, within the space occupied by the said turnpike road, so cut through and taken as aforesaid, a *certain bridge*, for carrying the said turnpike road over the said railway, of the *width of 30 feet 4 inches* only between the fences of the said bridge, and without any footway by the side of the road over the bridge, and that you have also caused certain *approaches* to the said bridge to be made along the line of the said turnpike road, and within the space occupied by the same, and which said approaches are respectively of the lengths following, that is to say, the approach on the Tewkesbury side of the said bridge of the length of 187 yards, and the approach on the Cheltenham side of the said bridge of the length of 126 yards; and *which said approaches* are of the following breadths respectively, that is to say, the approach on the Tewkesbury side of the said bridge is of the breadth of *30 feet 2 inches*, and no more, at the end next to the said bridge, and thence gradually increases to the breadth of *39 feet 8 inches*, and no more, at the end of the said approach, furthest from the said bridge; and the approach on the Cheltenham side of the said bridge is of the breadth of *30 feet 2 inches*, and no

more, at the end next to the said bridge, and thence gradually increases to the breadth of 30 feet 8 inches, and no more at the end of the said last mentioned approach, furthest from the said bridge; and that you the said Company have not made any footpath along the said approaches, or either of them, and that you did commence the operation of cutting through and taking the said turnpike road on the 22d day of November, 1838.

“ And whereas you the said Company were duly required, on behalf of the trustees of the said turnpike road, to make and restore the said turnpike road, with a footway, to the full breadth of 40 feet, as aforesaid, within six calendar months after the commencement of the said operation of cutting through and taking the same as aforesaid, as required by the said act, but that you the said Company have wholly neglected and refused, &c.”

The mandatory part of the writ then required the Company to make and restore, or cause to be made and restored, the said part of the said turnpike road according to the force, form and effect of the said act of parliament.

The return, after reciting the 41st section, proceeded thus:—“ We, the Birmingham and Gloucester Railway Company, return &c. that we have not, in execution of the powers of the said act and for the purposes thereof, cut through and taken the said part of the said turnpike road, in the said writ of mandamus particularly mentioned and specified, within the intent and meaning of the said last mentioned enactment hereinbefore in this return recited.

“ We do further return &c., that we, in execution of the powers to us given by the said act, did judge it necessary to erect the said bridge, in the said writ of mandamus mentioned, for the purpose of conveying the said turnpike road, in the said writ mentioned, over the said railway authorised by the said act to be made, and which has accordingly been made by us in pursuance thereof.

“ And we further return &c. that we accordingly erected

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and made the said bridge of a certain width, to wit, of the width of 30 feet 2 inches in the narrowest part thereof, and so that the road over the same has been formed so as to leave and does in fact leave a clear and open space between the fences of the said road of more than 30 feet, being a much greater width than is required by the said act of parliament.

“ And we further return &c. that, in consequence of the erection of the said bridge under the powers of the said act, it became and was necessary also to make approaches to the said bridge, and that we caused such approaches to be made to the said bridge along the line of the said turnpike road, which said approaches are respectively of certain lengths and breadths, to wit, of the respective lengths in the said writ in that behalf mentioned, an average breadth of 34 feet, and no part thereof of less than 30 feet 2 inches, and the ascent of which said approaches and bridges is not more than 1 foot in 30 feet, being the ascent required by the said act.

“ And we further return &c. that the carriage way of the said part of the said turnpike road in the said writ mentioned, before the making of the said bridge and approaches by us the said Company, was of the width of 29 feet and no more, with a footway raised 2 feet above the level thereof.

“ And we further return &c. that the said *approaches* and bridge, so made by the said Company as aforesaid, are as *convenient* to the public as the same could be made by us in execution of the powers of the said act, and as convenient to the public as the said part of the said turnpike road was in its original state, before the making of the said approaches and bridge by us the said Company.

“ And we further return &c. that, by the said act in the said writ mentioned, it was amongst other things further enacted (sect. 20), that nothing therein contained should authorise the said Company, or any person acting under

their authority, to take, injure or damage, for the purposes of the said act, any house or other building which was erected or built on or before the 30th day of November, 1835, other than and except such as are specified in the schedule to the said act annexed, without the previous consent in writing of the owner and occupier thereof respectively, unless the omission thereof in the said schedule should have proceeded from mistake, and unless it should have been so certified in manner therein before provided for in case of unintentional error in the said books of reference.

“And we further return &c. that, in order to carry the said turnpike road more conveniently over the said railway by means of the said bridge, it became and was necessary, in execution of the powers of the said act, to raise, and we the said Company accordingly did raise, the said parts thereof, which now form the approaches to the said bridge, above their former level, the same being of such ascent as is hereinbefore mentioned.

“And we further return &c. that by reason thereof we cannot now widen the said approaches to the said bridge without materially injuring and damaging divers, to wit, twenty houses, which were erected and built before the 30th of November, 1835, and which then and from thence hitherto were and still are the property of divers other persons, and not of us the said Company, which are situate, standing and being on the north-eastern side of the said approach and near thereto, none of which said houses are specified in the schedule to the said act annexed, and the omission whereof in the said schedule has not proceeded from mistake, nor has nor can the same be so certified to have proceeded from mistake, as in the said act mentioned.

“And we further return &c. that we cannot widen the said approaches to the said bridge without taking and purchasing for that purpose an additional quantity of land, which before, and at, the time of the passing of the said act,

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was and from thence hitherto hath been and still is the property of divers other persons, and not of us the said Company; and that the compulsory powers, given to us the said Company by the said act, to take and purchase land for any such purposes, had expired before we the said Company had any notice or were required by the said trustees in the said writ mentioned to widen the said approaches, and that we the said Company had not then nor have since had nor have now the power to take or purchase any land for such purpose.

"Wherefore &c. we submit and return that we cannot and are not bound to make and restore, or cause to be made and restored, the said part of the said turnpike road in the said writ mentioned in any other manner than we have already done, and that we have complied with the said acts of parliament so far as the same relates thereto."

The case was argued after a concilium.

The points, of which notice was given on the part of the prosecution, were—

1. That it is admitted by the return that the Company made the bridge for the purpose of carrying the turnpike road over the railway of a less width than the road was before the road was cut through by the Company.

2. That the same was admitted with respect to the approaches made to the bridge.

3. That the allegation, that the Company had not cut through and taken the turnpike road within the intent and meaning of the act, was an insufficient traverse of the allegation in the writ.

4. That the allegation, that the approaches and bridges are as convenient to the public as the same could be made, and as convenient to the public as the said part of the turnpike road was in its original state, is no answer, as the Company were bound to restore the road and make the bridge and approaches respectively of the same width as the road before it was cut through by the Company.

5. That the words "the said part of the said turnpike

road" are equivocal, and, if they apply to the carriage way, are no answer to the taking the turnpike road, consisting of the carriage way and footway, as in the writ alleged.

6. That the excuse that the Company cannot widen the approaches without materially injuring divers houses, &c., is insufficient.

7. That the return does not allege that the consent of the owners of such houses cannot be obtained.

8. That the return should have shewn how such houses would be injured.

9. That it is no excuse that the compulsory powers of the act to purchase land expired before the Company were required to widen the approaches, as the Company were bound to perform their duties under the act, whether they were required to do so or not.

Sir J. Campbell A. G. against the return, relied on the points above stated, and submitted that the 47th section, which laid down 15 feet as the minimum width of the road to be made over a bridge, was intended to apply to such occupation roads as might originally have been of less width than fifteen feet, and not to turnpike roads, which were invariably of greater width; that the road over the bridge, being part of the entire road, which was to be restored without exception by section 41, must also be restored to its ancient width, and that the judgment of the Court, in making the rule absolute for this mandamus, ought to be reconsidered in this respect. He cited the *Regent's Canal Company*, a case referred to in *Reg. v. London and Birmingham Railway Company* (a).

Sir W. W. Follett contra. By section 47 the bridge need not be more than 15 feet, and it follows that the same width is sufficient for the approaches. The Vice-Chancellor has decided this point in construing another railway act, containing (sect. 77) the same provisions with the

(a) 1 Railway Cases, 323.

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act now under consideration: *The Attorney General v. The Southampton Railway Company* (a). The approaches are generally to be considered part of a bridge: *Rex v. Oxfordshire* (b). There is nothing in this act to shew that the approaches are to be of the same width as before. The 29th section empowers the company generally to construct upon the railway such roads as "the company should think proper" "subject to the restrictions of the act." The 41st section does not apply to control this general power with respect to a turnpike road carried over the railway. That section merely applies where a turnpike road is made impassable by the Company's works for a time, in which case the old road is to be "restored" within six months; and by the former part of the section, in the case of all roads, whether turnpike or not, and whether the interruption be temporary or not, the Company is to substitute a road as convenient as the old road, or as near thereto as may be. That provision is reasonable, for there is no reason why a road newly made by the Company should not be as convenient and as wide as the old road. But it would be insensible that the legislature should in the same breath empower the Company to deal permanently with the existing road, and require them to restore the self-same road in all respects to its original state: with respect to the level of a road so dealt with, to carry it over the railway, such a restoration would be impossible. The amended act of the Company (the 7 Will. 4, c. xxvi.) does not require the Holyhead road to be made of the same width as the old road. This throws light on the meaning of the act now to be construed. No fact is in dispute, and it would have been more convenient that the prosecutor should have demurred, in order that, if such a course were practicable, the case might be taken into a court of error. [Lord Denman C. J. It seems to be thought impracticable, the point was dis-

(a) 1 Railway Cases, 302. He pany, ib. 317.

also referred to *Reg. v. The London and Birmingham Railway Com-*  
 (b) 1 B. & Ad. 289.

cussed in *Rex v. Oundle* (a); if the return had been traversed the traverse might have been demurred to.]

The prosecutor is at all events too late with his writ. He should not have waited until the Company had completed the road, and their compulsory power to purchase land had expired. If the Company have done wrong, they may be punished by indictment. But the object of a mandamus is not to punish, but to compel specific performance, which cannot be had in this case. A peremptory mandamus, therefore, would be useless. In *Rex v. The Commissioners of Sewers in Essex* (b) "to a mandamus to make a rate to reimburse an expeditor, they returned that the writ was not delivered till the 12th February, and that the commission expired in four days after, and therefore they had not time. And the Court allowed the return, saying they could not grant a peremptory mandamus, it appearing there was now no power in anybody to execute it."

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Sir J. Campbell A. G. in reply. It does not appear the Company cannot obtain land by consent.

*Cur. adv. vult.*

LORD DENMAN C. J., at the sittings after the term, delivered the judgment of the Court.—This case comes before us upon a return to a writ of mandamus, from which it appears that the said Company, by virtue of the act 6 Will. 4, c. xiv. have for the purposes of this railway taken a certain portion of the turnpike road, leading from Cheltenham to Tewkesbury, and erected a bridge thereon to carry the same over the railway, the whole length of road taken being 187 yards on one side of the bridge, and 126 yards on the other. It further appears that the said turnpike road was, before the alteration by the Company, of the breadth of 40 feet, viz. 29 carriage road and 11 raised footway; but that the breadth now is on one side of the

(a) 3 N. & M. 496.

(b) 2 Str. 763; S. C. 2 Ld. Raym. 1479.

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bridge 30 feet 2 inches, gradually increasing to 39 feet 8 inches, and on the other 30 feet 2 inches, increasing to 30 feet 8 inches, the breadth of the bridge itself not being in question. The mandatory part of the writ in substance directs the said Company to restore the said approaches to the bridge to their former state.

The return states that what the Company has done is not within the meaning of the said act, and also gives certain reasons why the writ can not be obeyed. And the question at last comes to this, whether this case is within the 41st section of the said act; because, except that section be applicable, there is no direct provision in the act bearing upon the case. For, although by the 46th and 47th sections, the breadth of the bridges over turnpike roads is prescribed (15 feet), there is no direction as to the width of the approaches, of whatever length they may be, and consequently whatever quantity of turnpike road may have been "*taken*" by the Company in order to construct them. It therefore follows, that, whatever may have been the breadth of the turnpike road before, the breadth of the part applied to the use of the Company is left absolutely to their discretion, except there be an *implied* direction to make the approaches as wide as the bridge itself.

The 41st section is as follows. [His lordship then read the section.] The argument was that this section is confined to the case of a turnpike road being made impassable by the works of the railroad, and a temporary road being substituted during such interruption. That a portion of this turnpike road has been "*taken*," within the words and obvious meaning of this section, we think is clear. How the works were actually carried on, we do not learn from the writ itself or the return, that is, whether there was a temporary line substituted during the progress of the works for the whole of the old turnpike, or how much. That there must have been some substitution in that part of the old line, where the bridge has been constructed, is obvious; that there must have been the like, during the altera-

tions which we find have been made along the whole or the greatest part of the rest of the line is probable. And, accordingly, we think, in the absence of any other provision, in a matter greatly affecting the public convenience, that it is not too forced a construction of this section to consider this as being a road which the Company was bound to restore within the specified time.

With respect to the rest of the return, to which we have referred generally, that the Company *cannot* now obey the writ for the reasons therein specified, we have had frequent occasion to observe that we consider such an excuse inadmissible. Before the Company avail themselves of the very great powers with which they are vested against the public, they should take care to act strictly within those powers. As to the compulsory rights of taking land &c. having expired, that rests entirely with the Company, for the act having passed in the year 1836, the works in question were not begun till more than two years after, when the power was gone. The notice to them is alleged to have been in time according to the act.

It remains for us to notice a case cited in the course of the argument, in which, as was said, the Vice-Chancellor has put a different construction upon a clause in another act of parliament resembling the present. It is true that his Honour does, in the case of *Attorney-General v. The London and Southampton Railway Company* (a), intimate incidentally such an opinion as has been attributed to him, the *question* before him then being whether he should declare by his order a certain "archwork" of the said Company to be a nuisance, and prohibit them from further prosecuting their works, because they were about to abridge the width of a public highway. The point, however, which now comes before us seems to have been very slightly touched in the argument, and was wholly unnecessary for the *decision* of the Vice-Chancellor, which was, that, provided the said arch "be not less" than the width prescribed by the

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(a) 1 Railway Cases, 302.



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act of parliament, he did not feel himself to be justified in making the order desired. The Vice-Chancellor also gives us a further reason for not making that order, that "many other methods" were open to raise the question, (alluding especially to an indictment for a nuisance) without his interference. We cannot therefore consider this to have been the deliberate judgment of the Vice-Chancellor upon this subject.

The result is, that the rule for a peremptory mandamus must be absolute.

*D.*

Peremptory mandamus awarded.



*Wednesday,*  
*June 2d.*

**THE QUEEN v. THE MANCHESTER AND LEEDS RAILWAY COMPANY.**

By 6 *Will.* 4, cap. cxi., s. 93, the Manchester and Leeds Railway Company had a general power to make the railway, and also to divert and sink such roads as they should think proper, subject to the restrictions of the act.

**MANDAMUS** to the defendants to excavate and widen a road crossed by the railway.

The writ recited that by 7 *Will.* 4, c. xxiv. (local, personal and public), enabling the Company to vary their line, and reciting, in section 38, that the new line of the said railway would cross the turnpike road leading from Oldham to Rochdale, at a different place from that specified in the original act of the Company (6 & 7 *Will.* 4, c. cxi.), and that it would be necessary to lower the bed of the said turnpike road at the place where the said railway

By sect. 38, 7 *Will.* 4, cap. xxiv. (an act enabling them to vary their line), they were authorised to carry the railway over a turnpike road by means of a bridge 30 feet wide, and to lower the turnpike road on each side of the bridge, with a specified inclination, and to give a certain headway underneath, and to relay and reform the road.

The turnpike road, consisting of a carriage way of 30 feet and two paths of 6 feet each, was 42 feet wide.

The Company made a bridge of the required width. They also lowered the carriage way of the road, but left the footpaths at their original level.

On the trial of certain traverses to a return to a mandamus, commanding the Company to lower the road to the whole width of 42 feet and to reform it, the jury found, 1. That the Company had not so lowered the road. 2. That the Company had reformed the road as directed by the act. 3. That the carriage road and footpaths, as made by the Company, were more commodious to the public, than if the whole road had been lowered to its full width of 42 feet.

A peremptory mandamus was issued, notwithstanding the finding on the two last issues.

same, in order to maintain a proper level  
 of the said railway, and to allow of a sufficient  
 bridge, whereon the said railway was to be  
 raised, the said turnpike road, for the passage of  
 carriages, and other carriages, along the said road,  
 it was expedient that provision should be made for  
 a proper level in the line of the said turnpike  
 as enacted, that it should not be lawful for the  
 company to carry the line of the said railway or to  
 take the same across the said road, unless the same should  
 be carried and made at their own expense over the said  
 road by means of a bridge, of the width of 30 feet at the  
 least, for the purpose of forming a clear carriage road of  
 20 feet wide, and a footpath of 6 feet wide, exclusive of the  
 pillars or piers which might be placed between the footpath  
 and the carriage road, and of the height of 18 feet, at least,  
 from the surface of the said road to the under side of the  
 said bridge, so as to leave a clear and uninterrupted head-  
 way under the said bridge of 18 feet at the least. And  
 further, that in case it should be expedient to lower the sur-  
 face of the said road for the purposes aforesaid, then it  
 should not be lawful for the said Company to lower or alter  
 the present bed of the said road, unless the same should  
 be lowered at their own expense on both sides of such  
 bridge, so that when the alteration should be completed, the  
 ascent on the said road southwardly from the said bridge, so  
 far as the alterations therein should extend, should not ex-  
 ceed 1 foot in height for every 50 feet in length, and so that  
 the ascent of the said road northwardly from the said bridge  
 should not exceed 1 foot in every 100 feet on any part of  
 the said road so to be made or altered, and that the said  
 Company should at their own expense make all new fences,  
 drains and works, and alter all existing ones, and relay and  
 reform the said road, and perform all other matters and  
 things that might be rendered necessary for the forming of  
 such railway. And also at their own expense make, and  
 at all times keep in repair, good and sufficient drains or

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culverts, for the purpose of draining or laying dry so much of the said road as should be lowered or altered as aforesaid; and that the alteration of the surface or bed of the said road should be made and constructed under the superintendence and direction of the trustees of the said road, or of the surveyor or other person authorised by the said trustees to act on their behalf in the premises.

The writ then proceeded, "And whereas we have been given to understand &c., that in the execution of the powers granted by the said acts, you the said Company have built and constructed a bridge or viaduct for carrying the said railway over and across the said turnpike road, and have excavated and lowered the said road underneath the said bridge or viaduct, for the purpose of affording a passage, with the requisite headway, for carriages under the same, for the distance of divers, to wit, 236 yards northwardly from the said bridge or viaduct, and for divers, to wit, 201 yards southwardly from the same:

"And whereas the *said turnpike road, previous to and at the time of such excavations and alterations made therein by you the said Company*, was a good, solid and substantial road, of the breadth of 42 feet throughout; and whereas, in the alterations and excavations made by you, you have in no part lowered and excavated the said road to its former breadth of 42 feet, but *to the breadth of 35 feet only northwardly from the said bridge or viaduct*, and to the breadth of 24 feet only southwardly from the same, and have commenced building walls along the sides of the said road so lowered and excavated by you, without having made and excavated the same to its former proper width of 42 feet:

"And whereas you the said Company have not reformed the said road in a proper and substantial manner, nor have you made and constructed such alterations in the surface and bed of the said road under the superintendence and direction of the trustees of the said road, or of the surveyor or other person authorised by the said trustees to act on

their behalf, as by the said last mentioned act of parliament is directed."

The writ, after reciting the refusal by the Company &c., then proceeded to command the Company "to make and excavate the said turnpike road, on both sides of the said bridge or viaduct, for so far in length as the excavations thereof by you the said Company extend, *the whole width of 42 feet &c.*, and that you reform the road in a proper and substantial manner &c., or that you shew cause &c."

The material parts of the return stated the general discretionary power given to the Company by their original act, to enter and take lands for the purposes of the act, and also to make or construct in, under, upon, across or over the railway, such roads &c., or other works, as they should think proper:

That the Company had, in execution of their powers, constructed the bridge in the writ mentioned of a width exceeding 30 feet, and that the carriage road under the bridge was made 24 feet wide, and the footpath on the easterly side more than 10 feet, and the footpath on the westerly side of the same width:

That, in order to maintain a proper level in the line of the railway, and to allow of a sufficient space under the bridge, whereon the railway is carried across the said turnpike road, for the passage of coaches &c., it had been deemed expedient to lower the surface of the road, and that they had accordingly lowered the road for affording a passage with the requisite headway:

That they had lowered the road so that the ascent on either side complied with the act, as recited in the writ:

That the road, before it was excavated by the Company, did not exceed forty-two feet in width, including both the carriage road and certain footpaths made on the line of the said road, i. e. a footpath on the easterly side thereof for so far in length as the excavations of the Company in the writ mentioned extend; and another footpath on the westerly side thereof for part of the said distance to which the exca-

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vations of the Company extend, and which respective footpaths have been left by the Company at their former height and level :

That in executing the works *they had lowered and excavated the said carriage road* northwardly from the bridge, for so far in length as the excavations made by them northwardly from the bridge extend, to wit, for the distance stated in the writ, *to its full former breadth*, that is to say, to the full breadth of such *carriage road* previous to and at the time of the commencement of such excavations and alteration, to wit, to a breadth varying from 35 to 36 feet, or thereabouts; and that they had lowered and excavated the said carriage road southwardly from the bridge for so far in length as the excavations made by them southwardly from the bridge extend, that is to say, for the distance in the writ mentioned, to the full former breadth of such carriage road, that is to say, to the full former breadth of such carriage road previous to and at the time of the commencement of such excavation and alteration, to wit, to a breadth varying from 30 feet 3 inches to 30 feet 6 inches, or thereabouts, in that part of the road where there were and are footpaths on both sides, and a breadth varying from 35 feet 4 inches to 36 feet, or thereabouts, in that part of the road where there was and is a footpath on the easterly side only :

That they had left the footpath on the easterly side of the road, northwardly and southwardly from the bridge, for so far in length as their excavations extend, at its former height and level, and that they had left the footpath on the westerly side of the road, southwardly from the bridge open 112 yards southwardly therefrom, where such footpath existed previous to and at the time of such excavation and alteration, and that they had left the same at its former height and level, which last mentioned footpath is continued by and through one of the arches of the bridge, that is, the arch on the westerly side thereof, for a footway of 10 feet as aforesaid to the north side of the said bridge, where the

same is let down by an inclined path into the road near the bridge on the north side thereof:

That they had divided the footpaths from the carriage road with steps in the footpaths at proper and convenient distances to communicate between the carriage road and footpaths respectively:

That they *had reformed the road* in a proper and substantial manner, according to the directions of the act:

That the carriage road and footpaths respectively as now made and completed, and as they now exist, are more *commodious and convenient* to the public &c. than the same would be if the same were excavated and lowered to the full breadth of 42 feet, as required by the writ:

That they had fully complied with the statutes as to the making of the alterations and excavations in the said road, and in reforming the same, doing as little damage as might be in the execution of their powers.

The material pleas to this return were—

2. Traversing that the Company had lowered or excavated the carriage road northwardly from the bridge for so far in length as the excavations extend in that direction to the full former breadth &c.

3. The same traverse as to the excavation southwardly.

12. A traverse as to the Company having reformed the road as stated in the return.

13. A traverse as to the road, as completed by the Company, being more commodious than if it were excavated to its full former breadth of 42 feet.

14. A traverse as to the Company having complied with the said acts of parliament in making the said alterations and excavations.

The other pleas and issues are immaterial.

Issues were joined on the abovementioned traverses, and tried at the Liverpool summer assizes, 1840. The 2d and 3d issues were found for the crown. The 13th for the defendants, and also the 12th and 14th, except as to certain drains under the road.

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In the Michaelmas term following, cross rules were obtained.

*Cresswell* obtained a rule nisi to enter the judgment for the defendants, notwithstanding the verdict given on the second and third issues for the prosecutors, and

*Alexander* obtained a rule nisi to enter the judgment for the crown, notwithstanding the verdict found for the defendants on the twelfth and thirteenth issues.

*Cresswell*, Sir *W. W. Follett*, *R. C. Hildyard* and *Tomlinson* now supported the former and shewed cause against the latter rule (a). They relied on the general powers given by the 94th section of the original act (6 *Will.* 4, cap. cxi.), and on the 44th section of the amended act (6 *Will.* 4, cap. xxiv.), by which, in case of the Company appropriating a turnpike road, they were to construct another road of 30 feet, which was a less width than that of the road in question, and contended that, after the issues as to the reform of the road and its increased commodiousness had been found in favour of the defendants, the Court would not issue a peremptory mandamus, a mandamus being a writ which it was entirely in the discretion of the Court to issue or not, according to *Com. Dig. Mandamus* (A); *Rex v. The Commissioners of Excise* (b), *Rex v. The Mayor of Arbridge* (c), *Rex v. The Mayor of London* (d), *Rex v. Tidderley* (e), *Rex v. Griffiths* (f); especially as there was another remedy by indictment, and that *Rex v. The Severn and Wye* (g), where the objection that there was such other remedy had been disregarded (h), had been decided on its peculiar circumstances.

(a) Before Lord Denman C. J.,  
*Patteson, Williams and Coleridge*  
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(b) 2 T. Rep. 381.

(c) Cowp. 523.

(d) 2 T. Rep. 177.

(e) Sid. 14.

(f) 5 B. & Ald. 731; S.C. nom.  
*Rex v. The Mayor of Bristol*, 1 D.  
& R. 389.

(g) 2 B. & Ald. 646.

(h) See also *Reg. v. The Bristol*  
*Dock Company*, ante, 286.

Sir J. Campbell A. G., *Kelly* and *Starkie*, contra. The opinion of the jury as to the commodiousness of the road in question cannot supersede the authority of an act of parliament. The argumentum a convenienti, in opposition to the plain rules of law, was overruled in *Rex v. Ward* (a). In the case of *The London and Birmingham Railway* (b) the Company appears to have had a discretion allowed them with reference to the convenience of the public, but this Company has not. The 97th section of the original act is expressed in the same terms as the 41st section of *The Birmingham and Gloucester Railway Act* (c), and requires this Company, where a road has been "sunk, taken, or injured, to "restore" it within six months. This has not been "restored," nor has it been "lowered" in the manner required by the 38th section of the amended act. The carriage road has been lowered, but the footpath has not; a footpath is part of a road within the meaning of the General Turnpike Act, 3 Geo. 4, c. 126, s. 111: *Loveridge v. Hodson* (d).

The argument as to the propriety of proceeding by mandamus was disposed of when the rule was made absolute for the writ issuing. This objection is too late now, and is, in itself, entitled to no weight: *Reg. v. The Bristol Dock Company* (e).

*Cur. adv. vult.*

Lord DENMAN C. J., at the sittings after this term, delivered the judgment of the Court.—This question comes before us upon a return to a mandamus, directing the Manchester and Leeds Railway Company to excavate a certain part of the Oldham and Rochdale turnpike road, taken by them to complete their said railway, to the old breadth of the old road.

From the mandamus and return it appears that the said

(a) 6 N. & M. 38.

(b) 1 Railway cases, 317.

(c) See the preceding case.


(d) 2 B. & Ad. 602.

(e) *Ante*, 286.

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Oldham and Rochdale turnpike road was, at the place where the said railway crosses the same, of the breadth of 42 feet, viz. 36 feet carriage and 6 feet footway; and, further, that by the 7 *Will.* 4, c. xxiv., s. 38, the said Company were to construct the bridge, by which the road was to be crossed, of the width of 30 feet at the least, and also, as the road was to be lowered, that the same should be done so that the ascent from the bridge should not exceed the specified amount. The bridge had been constructed of a width exceeding the directions of the act, and the road has been excavated on each side of it, but not to the whole extent of its ancient width.

Upon the said return various facts were traversed, and issues thereon raised have been found by the jury.

Those upon which reliance is chiefly placed, on behalf of the prosecutors, are the second and third, wherein it is found that the said Company have not lowered or excavated the said carriage road to the *full former breadth* of the said carriage road. And upon the parts of the defendants, the 12th and 13th issues are relied on, upon which the jury have found that the Company *have reformed the said road* in a proper manner, except as to the drains; and that the road as it now is *is more commodious and convenient* than if lowered or excavated to the full former breadth of 42 feet.

The question resolves itself into this, whether the excavation or lowering of the road should be extended to the whole original breadth of 42 feet, or whether what has been done, which by the return appears to fall short of that, in the proportion therein specified, is sufficient to satisfy the provisions of the act.

On the one side it has been contended, that (as is true) there is no express provision upon the subject, that some discretion is necessarily left to the Company, and that the finding of the jury upon the 13th issue, to which we have adverted, shews that such discretion has been fairly and beneficially exercised.

On the other it has been argued, that, as no width is spe-

cified, except so far as the bridge itself is concerned, it follows that, as to the rest, the road, after the excavation or lowering, rendered necessary for the purposes of the Company, should remain of its original width, and that the abridgment of the width (where intended) being expressed, is in favour of the latter construction. It follows, therefore, that we are called upon to put an interpretation upon the clause of the act itself.

That clause (7 *Will. 4*, c. xxiv., s. 38) authorises the Company to make the new line of their railway across the road in question, and prescribes the terms and conditions upon which they are permitted to do so. It is declared "to be expedient that provision should be made for preserving a proper level in the line of *the said turnpike road*." And further, "that in case it shall be necessary to lower the surface of *the said road*, for the purposes aforesaid, it shall not be lawful for the Company to lower or alter *the bed of the said road*," except upon the terms specified. Those terms are, "that *the same* shall be lowered on both sides of the said bridge (the bridge prescribed), with a certain ascent each way. It is observable, therefore, that wherever in this clause the road is mentioned, and more particularly in the clause last cited, the *whole* road, and not any part of it, is spoken of, and the road is to be lowered on both sides of the bridge to its full width, for none other than that is alluded to. We must also observe that throughout the clause no mention is made of lowering the road in such manner as to render the same "more commodious and convenient to the public," so as to supersede the necessity of a literal compliance with the terms prescribed by the act itself. We cannot therefore consider the finding of the jury upon the 13th issue, so much relied upon on behalf of the defendants, as sufficient to dispense with a compliance with the language and meaning of the act.

D. Peremptory mandamus awarded (a).

(a) See the preceding case.

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CHANNEY v. PAYNE.

Whether or not a justice of the peace may draw up a corrected record of a summary conviction after he has returned one record of it to the quarter sessions, he cannot do so in a case where the first conviction has been brought up by certiorari and quashed. Where a prisoner has been brought up by a writ of habeas corpus and discharged, on the ground of the insufficiency of the conviction as appearing by the recital in the warrant of commitment, the conviction itself not having been brought up by the crown,

and the certiorari having been taken away from the prisoner by statute, such proceeding is equivalent to a quashing of the first conviction, and a justice of the peace cannot afterwards draw up another formal one.

A conviction under the 70th section of the Pilot Act, 6 Geo. 4, c. 125, for "continuing" in charge of a ship after a duly licensed pilot had offered to take charge of it, is bad, if it do not shew that the offer was made to or in the presence of the party in charge of the vessel, or that it otherwise came to his knowledge. It ought also to appear in the conviction that the defendant was the person in charge of the vessel when the offer was made; and *semble*, that this does not sufficiently appear from an allegation that he "continued" in charge of it after the offer.

Though the consent of the Warden of the Cinque Ports or of the Trinity House Corporation respectively is required before proceeding to recover penalties under the Pilot Act, it is not necessary that such consent should appear in the conviction, which is sufficient in that respect if it follow the form given by that statute:

**TRESPASS** for a false imprisonment. Plea, not guilty. At the trial before *Tindal*, C. J. at the summer assizes, 1839, for the county of Essex, it was in evidence, that the plaintiff had been imprisoned under a warrant of commitment, professing to be founded on a conviction under the statute 6 Geo. 4, c. 125, s. 70, for continuing in the conduct and charge of a ship after a licensed pilot had offered to take charge of it. The conviction took place on the 13th September, 1837, and in the following month of January the plaintiff was brought up by habeas corpus before *Patteson*, J. in the Bail Court, and was discharged, upon the ground that the conviction (a) was bad on the face of, it for want of stating that the offer by the licensed pilot was made to or in the presence or hearing of the plaintiff, or in any way brought to his knowledge. Evidence was given to shew that this conviction had been returned to the quarter sessions in October, 1837, but was taken away again, and ultimately delivered to the clerk of the peace, together with a second conviction, in which the omission had been supplied. Upon these facts the Lord Chief Justice held, that the first conviction was not good, and afforded no justification to the defendant, and that the second conviction was not admissible in evidence. The

(a) As recited in the warrant of commitment. See the case reported 6 Dowl. P. C. 281.

plaintiff had a verdict for 64*l.*, the learned judge giving the defendant leave to move to enter a verdict for him, if the Court should be of opinion that the second conviction ought to have been received in evidence; and that, if received, it would have been a bar to the action(a). A rule

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(a) The first conviction was as follows:—"Borough of Maldon in Essex, to wit. Be it remembered, that on the 13th September, 1837, at the borough of Maldon in the county of Essex, *John Chaney*, of Heybridge in the county of Essex, porter, is convicted before me, *John Payne*, of Maldon aforesaid, esquire, one of her Majesty's justices of the peace for the borough of Maldon, for having, on the 3d September, 1837, at a certain place called Stansgate, in the river Blackwater, and within the liberties and jurisdiction of the said borough of Maldon, continued in the charge and conduct of a certain ship or vessel called the *Shipwright*, of Maldon, without being a duly licensed pilot, after *Abraham Handley*, a pilot duly licensed and qualified to act in the premises, had offered to take charge of such ship or vessel, contrary to an act passed in the sixth year of King *George* the Fourth, intituled, &c.; and I do adjudge that the said *John Chaney* hath therefore forfeited the sum of 20*l.*, to be applied as the law directs; that is to say, 6*l.* 13*s.* 4*d.*, one-third thereof, to *William Knight*, of Maldon aforesaid, pilot, who made and prosecuted the information in this behalf, and the remainder of the said sum of 20*l.* being 13*l.* 6*s.* 8*d.* to be carried to and applied to the purposes of the fund belonging to the

Corporation of the Trinity House, called the *Pilots' Fund*. Given under my hand and seal the day and year first above written. *John Payne*."

The conviction afterwards drawn up was as follows:—"Borough of Maldon, in the county of Essex, to wit. Be it remembered, that on the 13th of September, 1837, at the borough of Maldon, in the county of Essex, *John Chaney*, of Heybridge, in the county of Essex, porter, is convicted before *John Payne*, one of her Majesty's justices of the peace in and for the said borough of Maldon, the written consent of the Corporation of the Trinity House of Deptford Strond having been first obtained for that purpose by the party prosecuting, of having, on the 3d September, 1837, at a certain place called Stansgate, in the river Blackwater, in the said borough of Maldon, and within the liberties and jurisdiction of the same borough, unlawfully continued in the charge and conduct of a certain ship or vessel called the *Shipwright*, of Maldon, the said *John Chaney* not then being a duly licensed pilot in that behalf, after *Abraham Handley*, a pilot, then and there being duly licensed and qualified to act within the limits within which and at the place at which the said ship and vessel then was, had then and there, and whilst the said *John*

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nisi was obtained accordingly to enter a verdict for the defendant or for a new trial, on the ground that the first conviction was sufficient, against which

*Chambers* shewed cause(a). The second conviction was not admissible in evidence, nor, if receivable, would it be a justification. The facts shewed that the first conviction was returned and filed at the October sessions. It is true that a magistrate may, until he has returned or recorded a conviction, make up a correct record of it; but after a record has been formally drawn up, and transmitted from the justice to the proper custody, his power, as regards the conviction, is at an end; no court can amend or alter it, nor can an alteration be in effect made by returning another conviction to the quarter sessions as the record of the same conviction before returned. It is clear that it is the duty of the justices to return all convictions to the quarter sessions. A very old statute, 3 *Hen. 7*, c. 1, requires recognisances to be returned to the next sessions, and a like duty as to the convictions is imposed by the statute 7 *Geo. 4*, c. 64, ss. 2 and 3. [*Coleridge*, J. That statute does not appear to refer to convictions.] At all events the duty exists, and did exist before that statute; *Rex v. Eaton*(b). No authority, which can be cited in favour of the right of the justice to draw up another and corrected conviction, extends the right beyond the period succeeding the drawing up a formal conviction; *Rex v. Eaton*(b); *Rex v. Barker*(c); *Paley on Convictions*(d).

But, if received, the second conviction was bad on the *Chaney* was so in charge of the said ship and vessel as aforesaid, come on board the said ship and vessel, and offered to the said *John Chaney* and to the master of the said ship and vessel, in the presence and hearing of the said *John Chaney*, to take charge of such ship or vessel, contrary to an act passed in the sixth year of the reign of King *George the Fourth*, intituled, &c. [Adjudication and conclusion as in the former conviction.]

(a) H. T. Wednesday, Feb. 3, before Lord *Denman*, C.J. and *Patteson* and *Coleridge*, Js.

(b) 2 T. R. 285.

(c) 1 East, 186.

(d) 3d ed. 62.

face of it, and would therefore be no bar. The conviction is founded on the stat. 6 Geo. 4, c. 125, s. 70(a). The offence consists in refusing to give up the charge of a vessel to a licensed pilot within the limits of his licence. Two different bodies are referred to, as having authority to grant licences over different limits — the Corporation of the Trinity House, and the Lord Warden or Lieutenant of the Cinque Ports, ss. 2 and 14. Then the 76th section prescribes the modes of recovering penalties when the amount may exceed 20*l*. It requires the written authority of the Trinity House Corporation, or of the Lord Warden or Lieutenant of the Cinque Ports respectively to the proceeding. This conviction, setting out the assent of the Trinity Corporation only to the proceedings for the penalties, ought to shew the refusal of the offer of a pilot licensed by them, to be within the limits of their licences.

The first conviction is clearly bad. The conviction must allege a refusal to give up the ship to the pilot by the party in charge of the vessel after he has knowledge of the offer of the pilot to take the direction of her; *Peake v. Carrington*(b), *Reg. v. Chaney*(c).

*M. Smith* and *Bovill*, contrà. The error in the first conviction is clearly a mistake, which was corrected by the second; and the authorities shew that such correction may

(a) And be it further enacted, that it shall be lawful for any licensed pilot within the limits of his license, and the extent of his qualification therein expressed, to supersede in the charge of any ship or vessel any person not licensed to act as a pilot, or not licensed so to act within such limits, or acting beyond the extent of his qualification; and every person assuming or continuing in the charge or conduct of any ship or vessel without being a duly licensed pilot, or without being duly

licensed to act as a pilot within the limits in which such ship or vessel shall actually be, or beyond the extent of his qualification as expressed in his license, after any pilot duly licensed and qualified to act in the premises shall have offered to take charge of such ship or vessel, shall forfeit for every such offence a sum not exceeding fifty pounds nor less than twenty pounds.

(b) 2 B. & B. 399.

(c) 6 Dowl. P. C. 281.

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be made, and by that mode (*a*). In some of the cases it was done after an action had been brought for an imprisonment under a warrant following an informal conviction; *Rex v. Barker*(*b*); *Massey v. Johnson*(*c*); *Gray v. Cookson*(*d*). In *Rex v. Allen*(*e*) it was held this might be done though the party had given a copy of the informal conviction to the plaintiff. *Selwood v. Mount*(*f*) is a decision of *Alderson, B.* directly in point in this case, that, though a conviction may have been returned to the sessions, another and more formal one may be drawn up and used as a justification, in an action brought against the justices.

A record of a conviction being produced, it cannot be contravened by evidence; *Ashcroft v. Bourne*(*g*). The justices having jurisdiction to find what they have found, and to make a record of such finding, the record, when made up and produced, cannot be contradicted. The conduct of the justices in drawing up such record must be questioned in another manner.

The second conviction was clearly a bar. The statute on which it was founded gives the form of a conviction (*h*),

(*a*) It was also contended that upon the facts proved, the conviction could not be taken as returned at the quarter sessions.

(*b*) 1 East, 186.

(*c*) 12 East, 67.

(*d*) 16 East, 13.

(*e*) 15 East, 333.

(*f*) 9 C. & P. 75.

(*g*) 3 B. & Ad. 684.

(*h*) And for the more easy and speedy conviction of offenders against this act, be it further enacted, that all and every justice and justices of the peace, magistrate or magistrates, before whom any person shall be convicted of any offence against this act, or against any bye law, rule, regulation or order hereby directed to remain in force, or hereafter to be made under the authority hereof,

shall and may cause the conviction to be drawn up according to the following form, or in words to the like effect; videlicet,

“Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_, *A. B.* is convicted before me [or us], one [or two, as the case may be] of his majesty's justices of the peace for the [here specify the offence, and the time and place when and where committed, as the case may be], contrary to an act passed in the sixth year of the reign of King George the Fourth, intituled, [here insert the title of this act], and I [or we] do adjudge that the said [here insert the offender's name] hath therefore forfeited the sum of [here insert the penalty]. Given under my hand and seal

and that has been followed. The assent of the licensing authority was necessary before proceeding for the penalty; but it was no part of the facts required to be found by the conviction.

But the first conviction was good upon the face of it, and therefore a bar. It follows the words of the act creating the offence. A form of conviction is also given by the statute which this conviction pursues. In this case it appears that the plaintiff was the person in charge of the vessel, because the offence is alleged to be the continuing in possession, and in this respect it differs from the case of *Peake v. Carrington* (a). (*Rex v. Chandler* (b); *Rex v. Fuller* (c); *Rex v. Marsh* (d) were also cited).

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—After stating the facts of the case as above given, his Lordship proceeded. We are of opinion that the first conviction is bad upon the face of it. The case of *Peake v. Carrington* (a) is in point, upon the authority of which principally the discharge took place (e). A distinction was attempted to be made, because in that case the party convicted was not in charge of the vessel when the offer was made, whilst it was said that the present plaintiff did appear to be so. That is not quite correct, for the first conviction does not in terms allege that he was so in charge, and it is left to be inferred from the use of the word “continued” in charge, an inference which is by no means necessarily involved in that word. But, if it were so alleged,

[or our hands and seals] the day and year first above written.”

And no certiorari or other writ or process for the removal of any such conviction or any proceeding thereon into any of his majesty's courts of record at Westminster

shall be allowed or granted.”

(a) 2 Brod. & Bing. 399.

(b) 1 Lord Raym. 581.

(c) 1 B. & P. 180.

(d) 2 B. & C. 717; S. C. 4 D. & R. 260.

(e) See 6 Dowl. P. C. 281.

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we do not think the distinction of any weight. It is quite consistent with all that is alleged that the offer may have been made by the licensed pilot to the master of the ship, (the plaintiff not being the master but an unlicensed pilot), behind the back of the plaintiff, and may never have come to his knowledge. It may be sufficient in describing an offence in a conviction to follow the words of the act creating the offence, so far as the description of it goes, but it is always necessary to add such facts as shew that the person convicted was a party to that offence so described, which is not done here, inasmuch as it is plain that the continuing in charge of a ship in *ignorance* of a licensed pilot having offered to take it is not the offence, but the offence must depend on the knowledge of the party charged, although the word "after" is the only word used in the section in question. The first conviction therefore afforded no defence to this action.

Again, we are of opinion that the second conviction was good on the face of it, and would, if admissible in evidence at all, be a bar to the action.

This second conviction follows the form given in the act of parliament, and the only objection suggested to it is, that, although it states the consent of the corporation of the Trinity House to have been given to the prosecutor, yet it does not state that the offence was committed within the jurisdiction of the Trinity House, therefore that the consent of the Lord Warden of the Cinque Ports may have been that which the act requires. The answer is, that, though the act requires such consent, yet the form of conviction does not contain any allusion to it. It was necessary to prove it, but wholly unnecessary to state it in the conviction. Assuming therefore that the statement is defective for the reason suggested, it is of no consequence, for utile per inutile non vitiatur.

The only remaining question, and indeed the only one on which any difficulty arises, is whether the second conviction was admissible in evidence, and this depends upon

the right of the magistrate to substitute a good conviction for a bad one under the circumstances which here occurred. The cases of *Rex v. Barker* (a), *Rex v. Allen* (b), *Basten v. Carew* (c), and *Rex v. Justices of Huntingdon* (d), establish clearly that magistrates are not bound by the conviction first drawn up, whether it be merely a note of the conviction, or drawn up in a formal manner, as the conviction itself, but that they are at liberty, when called upon by appeal to return the conviction to the quarter sessions or by certiorari into this Court, to draw up and return a more formal conviction, correcting any errors which may have existed in that first drawn up, provided the latter conviction be according to the truth and the facts of the case as proved before the magistrates. By allowing this to be done the public are protected against the evil of a failure of justice for defect of form, when the facts are well proved, and the magistrates are protected from being harassed by vexatious actions where they have done what justice and the merits of the case required, but have inadvertently made some slip in the form of the document drawn up. This general rule of law and practice was not and could not be disputed, but it was contended for the plaintiff that this rule must be understood with some limit, and that after the magistrate had returned the conviction to this Court or to the Court of Quarter Sessions, it was too late for him to draw up another and a different one, in order to protect himself in an action.

One case was cited by the defendant to shew that it was not too late, viz. the case of *Sellwood v. Mount* (e). That was an action of trespass against a magistrate, who in his defence put in a conviction drawn up after another, which had been returned to the sessions, and which was open to objections. Mr. Baron *Alderson* thought that it might be done, and received the second conviction in evidence, but held that it did not amount to a justification, and the

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(a) 1 East, 186.

&amp; R. 558.

(b) 15 East, 333.

(d) 5 D. &amp; R. 588.

(c) 3 B. &amp; C. 649; S.C. 5 D.

(e) 9 Car. & P. 75, and *post*, 338.

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plaintiff had a verdict. A rule nisi was obtained in this Court for setting aside that verdict and has been argued, and upon the argument one of the points raised was whether that second conviction was admissible in evidence, so that the case can hardly be considered as a strong authority. It is the opinion of that learned judge, apparently but not necessarily opposed to that of Lord Chief Justice *Tindal* in the present case, both opinions being given without full argument at nisi prius.

We should observe that the second conviction in this case was drawn up after the decision of *Reg v. Chaney* in this Court in Hilary Term 1838, but the first conviction was not before the Court on that occasion. The writ of certiorari is taken away from the defendant, and the crown did not bring it up by certiorari, so that it was never returned to this Court, and the decision proceeded upon a defect in the warrant of commitment, which recited the conviction.

Upon the evidence we think that the first conviction must be taken to have been returned to the clerk of the peace, and filed among the records of the sessions in the month of October, 1837. The question therefore is whether, after it has been so returned, and after the discharge of the plaintiff by this Court, it is too late to cure any defect in it by substituting a more formal one. The counsel for the defendant argued that a conviction is a record when first signed by the magistrates, that its character is not altered by being returned to the sessions, where it is deposited merely for safe custody, and that, if it may be altered before such return, there is no reason why it should not afterwards. Convictions have undoubtedly always been treated as records, and for that reason they were, prior to 4 Geo. 2, c. 26, required, when filed, to be in Latin, therefore the returning them either to this Court or to the sessions does not alter their character, and possibly it may be competent to the magistrates, even after such return of an informal conviction, to return another formal one, before any motion is made to quash the conviction, or appeal

heard. But it can hardly be contended that after a conviction has been removed by certiorari and quashed by this Court, or by the sessions on appeal, any other conviction can be effectually drawn up. If it could, the party, who has been discharged from punishment by competent authority, might again be put in jeopardy and punished for the same offence. Again, if such a course could be pursued, the statute 43 *Geo. 3*, c. 141, would have been wholly unnecessary, and would have put the magistrate in no better position than before. If, by drawing up another formal conviction after an informal one had been quashed, he could have protected himself altogether from any action, surely the legislature would never have passed an act to forbid the plaintiff, after a conviction has been quashed, from recovering more than the penalty levied, and twopence, without costs unless he can prove malice and want of probable cause. We may therefore safely lay it down as law that it is too late for a magistrate to draw up a second conviction after the first has been quashed. In the present case however the first never was quashed, but we are of opinion that the decision in this Court, under the circumstances and for the purposes of this argument, has the same effect as quashing the conviction. That decision indeed proceeded upon the defect apparent on the commitment, and on the recital therein of a bad conviction, but, as the recital was true and the commitment was bad, we think that the discharge of the plaintiff according to that decision put an end to the proceedings, and rendered it equally incompetent to the defendant to draw up any other conviction upon the original information, or take any other steps in the matter, as if the conviction had been actually quashed.

For these reasons, we are of opinion that the Lord Chief Justice was right in refusing to admit the second conviction to be read, and that the rule for a new trial must be discharged.

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The quarter sessions have no power to make a general order for the costs of an appeal, though they may refer the taxation of the amount to their officers, provided they during the session adopt his decision, and incorporate it in the order. This rule is equally applicable, whether the sessions have a discretion to award costs or not.

The non-payment of costs awarded by an order of the quarter sessions, on the trial of an appeal against the stoppage of a highway, under the stat. 5 & 6 Will. 4, c. 50, s. 90, is not an offence forming a subject for a conviction under the 101st and 103rd sections of that statute, but the non-payment of them may be enforced by a distress warrant, issued by two justices under the 103rd section, grounded directly on the order of sessions.

Such a distress warrant is bad, if it do not shew on the face of it an order of sessions for the payment of a specific sum as costs.

*Quere*, whether any property passes to a purchaser by a sale under a distress warrant so defective (a).

SELLWOOD v. MOUNT, BUNNEY and another.

**TRESPASS** *quare clausum fregit*, with a count *de bonis asportatis*. Plea, not guilty (by statute). This was an action tried before *Alderson*, B., at the summer assizes, 1839, for Berkshire. The plaintiff complained of the taking of certain wheat ricks and a table, his goods and chattels, under a distress warrant, granted by two of the defendants, who were magistrates of the county. The other defendant was the constable who executed the warrant. It appeared that an appeal had been tried at the Berkshire quarter sessions, under the Highway Act, 5 & 6 Will. 4, c. 50, s. 88, against an order of two justices for stopping up a public footway. The sessions made an order in the following form:—

“Berkshire, to wit. At the general quarter sessions of the peace, &c. holden at, &c. on Tuesday the 3rd July, in the second year of the reign, &c. and in the year of our Lord, 1838. Before [title of the court].”

“Upon the appeal of *William Jones Williams*, against a certificate under the hands of *William Morland* and *Edward Tull*, Esqs., two of her Majesty's justices of the peace for the county of Berks, bearing date the 18th day of April, 1838, for stopping up as unnecessary a certain public footway leading from and out of Cow Lane, through Cranes Close, then crossing the Haydon Road, and from thence leading round part of the west end and the north west end of a certain piece of land called the Ash Piece, occupied by *Benjamin Sellwood*, and terminating at or near a hill called Church Hill, all in the parish of East Ilsley, in the county of Berks; and upon reading the certificate lodged

(a) See *Lock v. Sellwood*, note at the end of this case.

with the clerk of the peace, and hearing what could be said by counsel and witnesses on both sides, and upon the return of a verdict of a jury then empanelled, that the said public footway is not unnecessary: It is ordered, that the appeal of the said *William Jones Williams* be allowed, and that the said footway be not stopped up. And it is also ordered by this Court that the respondent, *Benjamin Sellwood*, pay unto the appellant the costs by him incurred in prosecuting the said appeal.

By the Court.

(Signed) *W. Budd*, Clerk of the Peace."


The costs were not taxed during the session, nor until the 27th December, 1838. The plaintiff did not attend the taxation, and, having refused to pay, was, under sects. 90, 101, 103, summoned before two justices to answer to a complaint of not having paid them. The plaintiff did not attend the hearing, and the defendants, *Mount* and *Bunny*, convicted the plaintiff upon such refusal, and directed a distress warrant to issue. A conviction of a refusal to pay the costs was drawn up and returned to the sessions, which being in several respects defective, another conviction was drawn up and produced at the trial. In neither conviction was any order of sessions recited for the payment of a specific sum as costs. The reception of the second conviction in evidence was opposed, but received by the learned judge. A warrant of distress was afterwards issued, under which the seizure complained of took place. It was in the following form:—

"Berkshire, to wit. To the constable of the parish of East Ilsley, in the county of Berks.

"Whereas *Benjamin Sellwood*, of East Ilsley aforesaid, gentleman, is this day convicted before us, two of her Majesty's justices of the peace in and for the said county, upon the oath of *William Jones Williams*, of East Ilsley aforesaid, gentleman, a credible witness, for that the said *Benjamin Sellwood* hath refused and still doth refuse to pay to the said *William Jones Williams* the sum of 11*2*l. 0*s*. 4*d*., the taxed costs incurred by him in prosecuting an ap-

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peal against the stopping up of a certain public footway in the parish of East Ilsley aforesaid, tried at the general quarter sessions of the peace holden at Abingdon in and for the said county, on the 3rd day of July now last past, where the said *William Jones Williams* was the appellant, and the said *Benjamin Sellwood* respondent, contrary to the statute made in the fifth and sixth years of the reign of his late Majesty William the Fourth, intituled, "An Act to consolidate and amend the Laws relating to Highways in that part of Great Britain called England.


"These are therefore, in her Majesty's name, to command you to levy the said sum of 112*l.* 0*s.* 4*d.*, together with the sum of 1*l.* 1*s.*, the costs attending the information laid before us, the summons and conviction, making together the sum of 113*l.* 1*s.* 4*d.*, by distress of the goods and chattels of the said *Benjamin Sellwood*; and, if within the space of four days next after such distress by you taken, the said sum of 113*l.* 1*s.* 4*d.*, together with the reasonable charges of taking and keeping the same shall not be paid, that then you do sell the said goods and chattels so by you distrained, and out of the money arising by such sale, that you do pay the said sum of 113*l.* 1*s.* 4*d.* to the said *William Jones Williams*, returning the overplus, upon demand, to him the said *Benjamin Sellwood*, the reasonable charges of taking, keeping, and selling the said distress being first deducted, and if sufficient distress cannot be found of the goods and chattels of the said *Benjamin Sellwood*, whereon to levy the said sum of 113*l.* 1*s.* 4*d.*, that then you certify the same to us with this warrant. Given under our hands this 14th day of February, 1839.

*W. Mount.*

*Edward B. Bunny."*

The learned judge was of opinion that the order of sessions was defective, in not shewing on its face the amount of costs to be paid by the plaintiff; and that neither conviction furnished any defence to the action, because, even if the order of sessions had so shewn the amount, the nonpayment was not an offence, so as to be the subject of

a conviction, but merely supplied a ground for issuing a warrant of distress, founded directly upon the order of sessions, and reciting it. The plaintiff had a verdict against the defendants *Mount* and *Bunny*, the other defendant being acquitted, on the ground that, as a constable, he was protected by the warrant. In the Michaelmas term following, a rule was obtained to shew cause why a new trial should not be had, on the ground that the proceedings were a sufficient justification under the Highway Act, 5 & 6 Will. 4, c. 50, ss. 90, 101, 103.

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*Whateley* and *Tyrwhitt* shewed cause (a). The omission of the order of sessions to decide the amount of costs to be paid by the respondent is a fatal defect. The sessions cannot award costs generally, nor award them to be taxed by the clerk of the peace; they cannot delegate their authority; 2 *Nolan*, Poor Law, 312(b) and 574(c).

The conviction of the plaintiff was futile. A refusal to pay costs awarded by a valid order of sessions would not be an offence within the meaning of the 101st(d) section.

(a) On Saturday, February 5th. The argument in support of the rule was resumed April 15.

(b) Citing "*Rex v. Skinn*, 1 Bott, 470, pl. 487; and see *Rex v. Sweet*, 9 East, 15; *Rex v. St. Mary's, Nottingham*, 13 East, 57."

(c) Citing "*Rex v. Hargrave*, Trin. 45 Geo. 3. The costs in this case were in fact taxed by the deputy clerk of the peace, but the reason seems to apply not less to the principal than to his deputy, for which see *ante*, 312, (5); *Rex v. Townsend*, *ante*, 468, (1); and the same point admitted likewise in *Rex v. Sweet*, Mich. 48 Geo. 3; 9 East, 25."

(d) Sect. 90. "That the Court of Quarter Sessions is hereby authorised and required to award to

the party giving or receiving notice of appeal, such costs and expenses as shall be incurred in prosecuting or resisting such appeal, whether the same shall be tried or not, and such costs and expenses shall be paid by the surveyor or other party as aforesaid, at whose instance the notice for diverting and turning or stopping up the highway, either entirely or subject as aforesaid, shall have been given; and, in case the said surveyor or other party as aforesaid shall not appear in support thereof, the said Court of Quarter Sessions shall award the costs of the appellant to be paid by such surveyor or other party as aforesaid, and such costs shall be recoverable in the same manner as



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The appellants have mistaken their remedy. They should in such a case apply to two justices to issue a warrant of

any penalties or forfeitures are recoverable under this act."

Sect. 101. "That in all cases in which any penalty or forfeiture is recoverable before justices of the peace under this act, it shall and may be lawful for any justice to whom complaint shall be made of any such offence to summon the party complained against before any two justices, and on such summons the said two justices may hear and determine the matter of such complaint, and on proof of the offence convict the offender, and adjudge him to pay the penalty or forfeiture incurred, and proceed to recover the same, although no information in writing shall have been exhibited or taken by or before such justice; and all such proceedings by summons without information shall be as good, valid, and effectual, to all intents and purposes as if an information in writing was exhibited."

Sect. 103. "That all penalties and forfeitures by this act inflicted or authorised to be imposed for any offence against the same, and all balances due from a surveyor, and all costs and charges to be allowed and ordered by the authority of this act (the manner of levying, recovering and applying of which is not hereby otherwise particularly directed), shall, upon proof and conviction of the offences respectively before any two or more justices, either by the confession of the party offending, or by the oath of any

credible witness or witnesses (which oath such justices are in every case hereby fully authorised to administer), or upon order made as aforesaid, be levied, together with the costs attending the information, summons, and conviction, by distress and sale of the goods and chattels of the offender or person liable or ordered to pay the same respectively, by warrant under the hands of two or more justices before whom the party may have been convicted (which warrant such justices are hereby empowered and required to grant): and the overplus (if any), after such penalties, forfeitures, and fines, and the charges of such distress and sale are deducted, shall be returned, upon demand, unto the owner or owners of such goods and chattels; and, in case such fines, penalties, and forfeitures shall not be forthwith paid upon conviction, then it shall be lawful for such justices as aforesaid to order the offender or offenders so convicted to be detained and kept in safe custody until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security, to the satisfaction of such justices as aforesaid, for his or their appearance before such justices on such day or days as shall be appointed for the return of such warrant of distress, such day not being later than seven days from the time of taking any such security, and which security the said justices as

distress, founded directly on the order of sessions, in pursuance of the 101st section.

It was further argued that, if a conviction were the proper course, the conviction first drawn up was bad, and that it was not competent to the magistrates to draw up another. On the latter point the same authorities were cited as on the same point in *Chaney v. Payne*, ante, 348.

*Ludlow*, Serjt., Sir *W. W. Follett* and *Carrington*, contra. The cases cited in which it was determined that the same sessions which awarded costs must themselves determine

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aforesaid are hereby empowered to take by way of recognisance or otherwise; or in case it shall appear to the satisfaction of such justices, either by the confession of the offender or otherwise, that he hath not goods or chattels within the jurisdiction of such justices sufficient whereon to levy all such penalties and forfeitures, costs and charges, such justices may, at their discretion, without issuing any warrant of distress, commit the offender for such period of time, and in such and like manner as if a warrant of distress had been issued, and nulla bona returned thereon; but if a warrant of distress shall be issued, and upon the return thereof it shall appear that no sufficient distress can be had whereupon to levy the said penalty, forfeiture or fine, and costs and expenses aforesaid, and the same shall not be forthwith paid, or in case it shall appear to the satisfaction of such justices, upon the confession of the offender, or otherwise, that he hath not sufficient goods and chattels whereupon such penalty,

forfeiture or fine, costs and expenses, could be levied if a warrant of distress were issued, such justices shall not be required to issue such warrant, but in such case such justices are hereby required, by warrant under their hands, to cause such offender or offenders to be committed to the common gaol or house of correction of the county, riding or place where the offender shall be or reside, there to be kept to hard labour for any term not exceeding three calendar months, unless such penalties, forfeitures and fines, and all reasonable charges attending the same, shall be sooner paid and satisfied; and the penalties and forfeitures, when so levied, shall be paid, the one half to the informer. and the other half to the surveyor of the parish where such offence, neglect, or default shall happen, to be applied towards the repair of the highways thereof, unless otherwise directed by this act; but in case the surveyor shall be the informer, then the whole shall be applied towards the repair of such highway."

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the amount, either directly, or by adoption of the judgment of their officer, were cases in which the court had a discretion to award costs or not, but here the award of costs is compulsory, and the order is good, directing the costs generally to be paid, and leaving the amount to be determined by the officer of the court. With regard to the other point, the 90th section enacts, that costs given on these appeals shall be recoverable in the same way that penalties are directed to be recovered: the 101st and 103rd sections shew that this is by summons and conviction before two justices. The second conviction is good on the face of it, and it was competent to the magistrates to draw it up, though they had previously made an incorrect record of their judgment. (See *Chaney v. Payne*, ante, 348.)

*Cur. adv. vult.*

Lord DENMAN, C.J. now delivered the judgment of the Court.—This was an action of trespass against two magistrates, under whose conviction and warrant the goods of the plaintiff had been seized. The Court of Quarter Sessions for Berkshire, at the July sessions, 1838, upon an appeal against an order of justices, stopping up an highway, had impanelled a jury under the 89th section of 5 & 6 *Will.* 4, c. 50, who found that the way was not unnecessary. The court accordingly allowed the appeal, and by their order directed “that the respondent, *Benjamin Sellwood*, (the present plaintiff) pay unto the appellant the costs by him incurred in prosecuting the said appeal,” using the words of the 90th section of the act. The costs were taxed on the 27th of December following by a deputy of the clerk of the peace, in the absence of the plaintiff. Afterwards the plaintiff was summoned before the two defendants for not paying the costs, but did not attend; and they proceeded to convict him, and to levy the amount by their warrant, conceiving themselves to be called upon to do so by the 90th and 103rd sections of the act. [The Lord

Chief Justice read the 90th and 103d sections.] The defendants drew up a conviction, which was returned and filed at the sessions, but it was in some respect defective; and they produced at the trial another drawn up correctly, supposing them to have power to convict at all. The second was objected to as being too late, but was received by the learned judge.

It is not necessary for us to decide whether it was properly received, inasmuch as we agree with the learned judge, who held that neither conviction furnished a defence to the action.

Assuming for the moment that the order of sessions was valid, we are of opinion that the non-payment of the costs as awarded by it was no offence against the act, for which any penalty or forfeiture is by the act inflicted or authorised to be imposed, consequently that there could be no conviction of the plaintiff for such non-payment. The 103d section must be read *reddendo singula singulis*, and the true construction of it is, that the justices shall issue their warrant upon a conviction, where there has been an offence for which a penalty or forfeiture is inflicted or authorised to be imposed, and "upon order made as aforesaid," where costs have been awarded and not paid, notwithstanding the words "under the hands of two or more justices, before whom the party may have been convicted."

But the order of sessions is itself defective for not specifying the amount of the costs. The sessions cannot delegate their authority, and it has been several times held that they cannot order a party to pay *costs to be taxed by the clerk of the peace*; see 2 Nolan's Poor Laws, 312 and 574; *Rex v. Hargrave* (a); *Rex v. Skinn* (b); *Rex v. Sweet* (c).

A distinction was attempted in argument between those cases and the present, because the statutes on which they were decided give "reasonable costs," whereas the statute in question gives the "costs incurred by the party;" but it

(a) T. T. 45 Geo. 3.

(c) 9 East, 25.

(b) 1 Bott, 470.

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is a distinction without a difference. It is as necessary to ascertain the fact, what amount of costs has been incurred, as to judge what amount is reasonable; either duty falls upon some body, which must be the Court, in the absence of any authority to delegate the duty.

This rule will by no means prevent the Court of Quarter Sessions from directing their officer to tax the costs in their aid, and adopting his taxation as their own act, and inserting the amount in their order. Such a course was held to be proper in *Ex parte Holloway (a)*, and we entirely agree in that decision; but it does not warrant the making an order for "costs incurred," and leaving the amount to be ascertained by an officer after the sessions.

The rule for a new trial discharged (*b*).

(*a*) 1 Dowl. P. C. 36.

G.

(*b*) *LOCK v. SELLWOOD.*

TROVER for loads of wheat, &c. Plea:—First, that the goods and chattels, &c. were not the property of the plaintiff; secondly, that they were the goods and chattels of the defendant. This was an action against the plaintiff in the preceding case to recover possession of the wheat ricks and other property seized under the warrant set out in the above case. The warrant was proved, and that the plaintiff was the vendee at a sale under its authority. The case was tried immediately after the case of *Sellwood v. Mount and others*, and the plaintiff was nonsuited, on the ground that the proceedings were irregular, and that the warrant gave the constable no right to sell, and that neither it nor the sale could convey any title to the present plaintiff.

A rule was obtained for a new trial, on the ground argued in the preceding case, and also that if the proceedings were irregular, and the warrant irregularly issued, still a sale under it would pass the property to a bona fide purchaser.

*Whately* and *Tyrwhitt* shewed cause (*c*) against the rule.

*Ludlow*, Serjt., Sir *W. W. Follett* and *Carrington* supported it.

LORD DENMAN C. J. in delivering the judgment of the Court, said—In this case we are of opinion that the nonsuit was right. We think the warrant illegal upon the face of it, not only for the reasons given

(*c*) This and the rule in the preceding case came on together.

in our judgment in the case of *Sellwood v. Mount and others*, but because it does not state any order of sessions for costs at all; and it is plain that the justices out of sessions could not award costs.

But it is said that the bonâ fide purchaser under a distress warrant is protected, though the warrant be bad, by analogy to the cases of purchasers from the sheriff under a fieri facias afterwards set aside.

No case was cited in which such a point has been determined, and we think that the analogy does not hold.

His Lordship then proceeded to say, that they were of opinion that the plaintiff was not a bonâ fide purchaser, but that the sale was contrived between him and the respondent.

Rule discharged.

G.

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v.  
MOUNT.

### The QUEEN v. LONG, Esq.

Monday,  
May 24th.

**RULE** to shew cause why a mandamus should not issue, directed to *George Long*, Esq., one of the magistrates of a police court in the metropolis, commanding him to receive such information and complaints as should be laid before him, against *Robert Cook*, one of the overseers of the poor of the parish of St. James's, in the liberty of Westminster, or such other overseer, &c. as have neglected and refused to pay the "sum of 43*l.* 1*s.* 8*d.*, being the amount of costs and charges, certified by the Court of General Quarter Sessions of the Peace, lately holden in and for the borough of Portsmouth," upon an appeal against an order of removal, and by the said court "ordered and directed to be paid by the churchwardens and overseers of the poor of the said parish," to the overseers of the parish of Portsea, "and therefore to levy the said sum of 43*l.* 1*s.* 8*d.* accordingly."

The recorder at a municipal sessions may, on ordering costs, refer the taxation of the amount to an officer of the court, but such taxation must be adopted by him during the continuance of the same sessions. An order for such costs, founded on a subsequent adoption, is invalid.

The affidavit on which the rule was granted stated that an appeal against an order of removal had been tried at the Portsmouth Borough Quarter Sessions, held on the 26th December, 1839, and continued by adjournment until the 27th December, in which the churchwardens and overseers of the said parish of St. James's were appellants against an order of removal; that the said Court of Quarter Sessions confirmed the order, and ordered that the appellants should

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pay to the respondents their costs of the appeal; that the counsel for the respondents applied to the court to name a sum to be so paid, which the recorder refused, he stating that his practice was, in these cases, to leave the amount to be settled by the officer of the court; that the clerk of the peace was directed to tax such costs, and was therefore applied to by the attorney for the respondents to tax them, "but the said appeal being the last remaining business of the sessions, and the court having immediately afterwards adjourned," the clerk of the peace "was unable to attend to the matter during the sitting of the court, but directed the said attorney to make out and forward to him an account of the costs incurred," with the papers. The attorney did so, and the clerk of the peace settled the amount at 43*l.* 1*s.* 8*d.*; the clerk of the peace submitted the same and the particulars thereof to the recorder for his sanction, and the recorder expressed his opinion that the amount was not unreasonable. The clerk of the peace "made out a certificate thereof, by virtue of the statute in that case made and provided," and delivered the same to the said attorney for the respondents.

It was clear upon the affidavits, that the business of the sessions was concluded before the costs were taxed, and that there was no adjournment of any business then pending in the court. The appellants had no notice of the time fixed for the taxation of the bill of costs, nor were they present at any taxation of such bill, nor at any sanction of such taxation by the recorder. An order of sessions, confirming the order of removal, and ordering the appellants to pay costs taxed at 43*l.* 1*s.* 8*d.* was served on the 24th January, 1840, the said order bearing date the 26th day of December. The learned justice refused to issue his warrant of distress, on the ground that the order of sessions was informal, as it appeared that the court had referred the determination of the amount of costs to its officer, and had not, until after the termination of the sessions, adopted his judgment.

Sir *W. W. Follett* and *W. H. Watson*, who appeared to shew cause against the rule, were not heard.

*Erle and Poulden*, in support of the rule. The rule that a Court of Quarter Sessions, which in a county is a changing body, must, during the sessions, adopt any taxation of costs made by their order, does not apply to the case of a borough sessions, where there is a recorder, a continuing and unvarying judge. The taxation too, in this case, was adopted by the recorder, whose order purporting to be an order of sessions, states the amount to be paid. The rule itself was founded on a strict construction of the statute 8 & 9 *Will.* 3, c. 30, s. 3, the words of which are that the award of costs shall be at "the same sessions." These words are not in the statute 4 & 5 *Will.* 4, c. 76, s. 82.

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LORD DENMAN C. J.—All the facts were before the justice when he refused to issue his warrant. We have this day given judgment (a), that the award of costs must be the act of the Court of Quarter Sessions, though they may receive advice on which they may act. The recorder must exercise his judgment while sitting in that capacity, and it is clear in this case that the sessions were at an end, before he signified his adoption of the taxation of the costs by the clerk of the peace.

PATTERSON J.—It is quite clear that the quarter sessions have no authority to award a specific sum for costs except during the continuance of the same session at which the case was tried and costs ordered generally. It seems that the sessions were not ended in *Ex parte Holloway* (b).

WILLIAMS J. concurred.

COLERIDGE J.—The order must be made during the continuance of the sessions. It cannot be contended that such an order could be made at a subsequent sessions.

G.

Rule discharged with costs.

(a) *Sellwood v. Mount*, ante, 358.

(b) 1 Dowl. P. C. 27.



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Monday,  
May 24th.

In an action against a justice of the peace for a false imprisonment, who justified under a conviction under the Vagrant Act, 5 Geo. 4, c. 83:—Held, 1st. That the conviction was not vitiated by the omission of the word "part" before "of Great Britain" in the recital of the title of the statute, as directed in the form given by the act; 2dly. that pursuing that form it was not necessary to state the evidence on which the conviction proceeded; and 3dly. that an allegation that the person convicted was of sufficient ability to maintain his family, and did neglect so to do, whereby his wife became chargeable to the parish, was sufficiently certain.


NIXON v. NANNEY, Esq.

**TRESPASS** and false imprisonment. Plea: not guilty. At the trial before *Collman J.*, at the summer assizes for the county of Northumberland, 1839, an imprisonment of the plaintiff by the authority of the defendant was proved, which the latter justified under a conviction in the following form:

"Northumberland to wit.—Be it remembered, that on the 23d day of August, in the year of our Lord 1838, at the town of Haltwhistle, in the county of Northumberland, *John Nixon*, of Seaburn House, in the parish of Haltwhistle, in the said county, labourer, is convicted before me, *Lewis Nanney*, Esq., one of her Majesty's justices of the peace in and for the said county, of being an idle and disorderly person, within the intent and meaning of the statute made in the fifth year of the reign of his late Majesty King *George the Fourth*, intituled, 'An Act for the Punishment of idle and disorderly Persons, and Rogues and Vagabonds, in that of Great Britain called England,' that is to say, for that he the said *John Nixon*, being a person able wholly by work to maintain his family, did, on the 20th day of August, in the year aforesaid, at the parish aforesaid, in the county aforesaid, wilfully refuse and neglect so to do, whereby his wife, *Ann Nixon*, whom he (the said *John Nixon*) then was and is legally bound to maintain, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, did become and now is actually chargeable to the township of Melbridge, in the said county, and for which said offence the said *John Nixon* is ordered to be committed to the house of correction at Hexham, in the said county, there to be kept to hard labour for the space of one calendar month. Given &c. &c."

It was objected that the conviction was bad on the face of it, 1st. for a misrecital of the title of the statute (the Vagrant Act), 5 Geo. 4, c. 83, on which it was founded, by the omission in it of the word "part;" 2ndly. in omitting

the evidence on which it proceeded; 3dly. in describing too vaguely the plaintiff's ability to maintain his family. The opinion of the jury was taken on the amount of damages the plaintiff ought to recover in the event of the conviction being held invalid, and the question of its validity was reserved by the learned judge, by directing the verdict to be entered for the plaintiff, with leave to the defendant to move to enter a verdict in his favour. A rule was obtained accordingly, against which


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*W. H. Watson* now shewed cause. The conviction had defects on the face of it, which are fatal to its validity, as a bar to this action against the convicting justice. The conviction is obviously intended to follow the form given by the statute 5 Geo. 4, c. 83, s. 17, under which it took place, part of the directions of which form is, "*Here insert the title of this act.*" In attempting to comply with that direction, the statute has been misrecited. As appears by the recital, it was limited to a "part" of Great Britain, the word "part," which is in the title of the statute, being omitted. If the title of a statute were even unnecessarily set out in an action for penalties, a misrecital of it would be fatal, and a conviction must have a stricter construction than a declaration in a civil action.

Another objection to the conviction is, that it does not appear on what evidence the plaintiff was convicted. The 3d section of the statute, which gives the jurisdiction to a justice, requires the conviction to be proved on his own view, or the confession of the offender, or on evidence on oath. [The Court overruled this objection, on the ground that the conviction sufficiently followed the form given by the statute.]

A third objection is, that the allegation of the prisoner's ability to afford maintenance is too vague.

*Knowles* and *Ramshay* contra. The objection which was lastly taken to the conviction, is rendered unavailing by

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the 17th section of the act, which dispensing with the insertion of the evidence given requires only that the offence should be stated, as the statute says, "in the form or to the effect following, or as near thereto as circumstances will permit." The offence might have been more concisely stated, but redundancy will not vitiate the conviction, if it contain all the substantial parts of the form prescribed; *Rex v. Jefferies* (a). [The Court held that there was nothing in this objection.]

The principal objection made is, that the title of the act has been misrecited, but that will not invalidate the conviction. A declaration to recover penalties must receive as strict a construction as a conviction, and in *Chance v. Adams* (b), which was an action of debt on a penal statute, it was held, on demurrer, that the misrecital of the title of a statute was not fatal, "for the title of the act is no part of the act, and therefore it is but surplusage, and misrecital shall not vitiate." In *Rex v. Scott* (c) it was held by the judges that in an indictment an allegation that an offence was committed against "the peace of our said late lord the king," the word "late" might be rejected as surplusage. In *Rex v. Gill* (d), where an act was alleged to have been done in the fourth year of the reign of *Geo. 4*, the judges held the word "fourth" might be rejected. In *Rex v. Huggins* (e), *Vaughan J.* held that the "20th day of June" must be taken to mean the same thing as the "26th day of June." In this conviction the title would have been sufficiently recited if it had called it "An Act for the Punishment of disorderly Persons, and Rogues and Vagabonds," and the rest of the title may be rejected as mere surplusage.

Lord DENMAN C. J.—This statute directs the title of the act to be set out in the conviction; that has been sub-

(a) 4 T. R. 767. The principles laid down in the judgment of *Ashurst J.* in *Rex v. Thompson*, 2 T. R. 23, were also referred to.

(b) 1 Lord Raym. 77.

(c) 1 R. & R. 415.

(d) 3 C. & P. 414.

(e) 1 R. & R. 431.

stantially done. It has been ruled (a), in an action on a penal statute, that a misrecital of the title of an act would not vitiate the declaration.

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PATTESON and COLERIDGE Js. concurred.

G.

Rule absolute.

(a) *Chance v. Adams*, 1 Lord Raym. 77, which followed a decision of Hale C. J. in the *Attorney-General v. Hutchinson*, Hard. 324, "and Powell sen. J. said that it was so adjudged in the House of Peers between *Darwin* and the Earl of Monmouth; and by Treby C. J. the title of the act is but a new usage, and begun about the 11 Hen. 7, but the misrecital of the purview or enacting part always vitiates." In a later case, 2 Ann., the same point arose; *Mills v. Wilkins*, 6 Mod. 62; S. C. 1 Salk. 609; 3 Salk. 331; Holt, 662. The defendant justified in trespass, under the stat, 1 Jac. 1, c. 22, and in his plea misrecited the title of it ("mistook one word," 3 Salk. 331), and, upon demurrer, judgment was given for the plaintiff. *Chance v. Adams* was cited, but per Holt C. J. "It is true the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is part of the book, for the title is not the law, but the name or description given to it by the makers, just as the preamble of a statute is no part thereof, but contains the motives or induce-

ments thereof, and therefore it is not necessary to set forth the title or preamble, but 'generally that at a parliament session, held such a time &c., it was enacted,' though some have been so over cautious as not only to set forth the title of the act, but also to do it in English; but sure this is too much caution, and the true way to set it out, if at all, is in Latin, and by setting out the title specially, you tie your justification to an act so entitled, and if you cannot produce one you are gone; and he said the saying of Hale was sudden, if at all, notwithstanding his great veneration for his opinion, he could not agree with him. Gould J. agreed with the chief justice, Powell J. only declaring that he had concurred with the rest in the Common Pleas solely upon the opinion of Hale, reported in Hardres." There were two judges in the Common Pleas, named John Powell, who took part in the decision of the judgment reported in Lord Raymond. The senior of these, whose citation of a decision by the House of Lords is above given, was dead at the time the case in 6 Mod. was decided.—*Vide* 1 Ld. Raym. 103.

1841.

Monday,  
June 7th.

In a suit in the Admiralty for compensation for damage done by a collision, the defendant, the owner of the vessel, appeared and contested his liability; he did not release the vessel, which had been arrested, by giving bail, but allowed it to remain under arrest to answer the suit:—Held, that the Court of Admiralty had jurisdiction to give costs beyond the amount of the value of the vessel, notwithstanding the statute, 53 Geo. 3, c. 159.

Ex parte RAYNE.

**PROHIBITION.** This was a rule calling upon *John Foreman* and others, promoters of a cause of damage against the ship or vessel, *John Dunn*, her tackle, &c., and against the above-named *John Rayne*, the younger, in the Admiralty, Sir *Stephen Lushington*, Lieutenant of the High Court of Admiralty, &c. to shew cause why a writ of prohibition should not issue to the said court to prohibit the said court further proceeding in the said suit.

It appeared from the affidavits that the said *John Rayne* was the owner of a ship called the *John Dunn*. Between that ship and a ship called the *Tiber* there had been a collision, the consequence of which was that the *Tiber* was sunk. Two suits in the Court of Admiralty, one by the owners of the *Tiber*, and the other by the owners of the cargo on board, against the ship *John Dunn*, had been consolidated. Upon the suit being instituted, the ship *John Dunn* was arrested. *Rayne* did not put in bail, but elected to allow her to continue under the said arrest to answer the action. *Rayne* appeared in the suit, and contested the charge against the *John Dunn*, but ultimately a decree was made in it, by which the judge pronounced for the damage complained of, and ordered the ship *John Dunn* to be sold by auction. She was sold, but the amount realized was not sufficient to compensate the damage sustained by the complainants. They afterwards applied to the Court of Admiralty for a decree condemning *Rayne* personally in the amount of the costs of the suit. He opposed this application, on the ground that the proceedings were in rem, and that by the statute 53 Geo. 3, c. 159, the responsibility of shipowners for damage done on the high seas was limited to the value of the ship doing the damage, and her freight, tackle, &c. The said Court did nevertheless proceed to condemn *Rayne* personally to pay the said costs; and on the suggestion that such decree was

founded on a misconstruction of the above mentioned statute this rule was granted(a).

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RAYNE.

*Cresswell* shewed cause(b). The case of *Lord Camden v. Horne*(c) puts stricter limits on the doctrine of issuing prohibition to the Court of Admiralty where it has some jurisdiction, than it is necessary to contend for in the present case. The Court of Admiralty were acting within their jurisdiction, and they have rightly construed the statute 53 *Geo. 3*, c. 159, in holding that it did not prevent the award of costs against the defendant when he had appeared in the suit, and so become a litigant party before them. The first section of that statute enacts, that the owner of a ship or vessel shall not be liable to account for or make good any loss or damage arising by reason of any act or thing done without his fault or privity to any other ship or vessel, further than the value of his ship or vessel, and the freight due or to grow due during the voyage in prosecution when the damage was done. But that section does not prevent the Court in which the litigation is from exercising its ordinary authority in awarding that the unsuccessful party should pay costs. The owner of the vessel sustaining the damage cannot recover more than the whole value of the ship and appurtenances causing it, nor does he do so by being reimbursed the expense he is put to in litigation to recover that which the law awards to him. It was said in the case of *Gale v. Laurie*(d), in which the construction of this statute was much considered, "that it abridged the right of recovering damages enjoyed by the subjects of this country at the common law, and that there was nothing in it to require a construction more favourable to the ship-owner than the plain meaning of the words imports." The suit is commenced against the vessel, the owner

(a) In H. T. Jan. 12.

(c) 4 T. R. 382.

(b) On Wednesday, May 20,  
before Lord Denman, C. J., Patten-  
son, Williams and Coleridge, Js.

(d) 5 B. & C. 156; 3 C. 7 D. &  
R. 711.

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is not bound to appear in the suit; but, if he does so, it is a condition of his being permitted to defend it that he should pay the costs occasioned by that litigation, which the event shews to have been uncalled for. Suppose the suit had been in this Court for the collision, could not a verdict be given for the amount of damage to the full value of the ship; and could it be said that there is anything in the statute 53 Geo. 3 to prevent the usual consequence of the costs following in such a case as much as in any other (a)? The very point in this case has received a judicial determination. That very learned judge, Lord *Stowell*, in awarding costs in the case of the *Dundee* (b), said, "The claimant is entitled to remuneration for the costs, to which he is driven, for recovering his loss; they certainly form a part of that loss, and the statute is not guilty of that injustice which would ensue, if it excluded those costs that are necessary for replacing the sufferer in a just state of compensation. If the party is reinstated in the value of the property without litigation, there is no demand for costs; but if he cannot obtain the benefit of the statute in respect to compensation, without being driven to the necessity of a suit, the statute would be chargeable with great injustice if it did not admit the payment of these costs, and accordingly they are mentioned in several parts of the statute."

Sir *J. Campbell* A.G. and Sir *F. Pollock*, *contrà*. No case in point decided at common law has been cited in favour of the construction now contended for. The object of the legislature was that, happen what might, the owner of a ship, causing damage without his concurrence in producing it, should not be liable beyond the value of the ship and the freight which it was in the course of earning, when the damage complained of was done. The case of the *Dundee*, the decision of Lord *Stowell*, which was cited, differs

(a) Vide *Wilson v. Dickson*, 2 B. & Ald. 2. (b) 2 Hagg. Ad. Rep. 143.

from this, inasmuch as there bail had been given (a), and upon the recognisance costs might be recovered (b). In that case it was also considered that interest might be recovered upon the amount of loss sustained. The 7th section, at considerable length, does make provision for the relief of a shipowner, against whom several suits for damage shall have been brought, enabling him to file a bill in equity, and be released from his suits on payment of the value of the ship without costs. That section provides for costs in cases where the bill is dismissed for some default of the party filing it, but not otherwise, shewing therefore strongly the intention of the legislature to have been to limit absolutely the liability of the shipowner in the prescribed cases to the loss of his vessel and her freight.

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*Cur. adv. vult.*

Lord DENMAN, C. J. now delivered the judgment of the Court.—This case turns entirely upon the construction to be put on the 1st section of 53 Geo. 3, c. 159, which confines the liability of shipowners “to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter, or thing done, omitted or occasioned without the fault or privity of such owners, to the value of the ship or freight.”

The question is, whether this clause includes the costs of recovering compensation, whether by suit against the owners themselves, or against the ship, as well as the compensation itself, or whether the owners are personally liable for such costs, although they should exceed the value of the ship and freight.

The words of the section seem to apply more naturally to the actual loss or damage immediately resulting from the thing done, omitted or occasioned; and as costs are

(a) See *Gale v. Laurie*, 3 B. & Ald. 157.

(b) Giving bail will not enlarge

the responsibility beyond the statutory definition of it. *The Richmond*, 3 Hagg. Ad. Rep. 431.



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Ex parte  
RAYNL.

mentioned in the other clauses of the act, but not in this, we see no reason for thinking that the legislature intended to include them. Great temptation to vexatious litigation would be held out by deciding that they were included; and our opinion, that they are not, is strengthened by the express decision of Lord *Stowell* in the case of the *Dundee*(a). We agree with the noble lord in the view which he has there taken of the statute, and this rule must be discharged.

G.

Rule discharged.

(a) 2 Hagg. 137.

Tuesday,  
May 25th.

The APOTHECARIES' COMPANY v. GREENOUGH.

A chemist and druggist, practising as an apothecary in attending the sick and giving them medicines for reward, is liable to penalties under the statute 55 Geo. 3, c. 194.

**DEBT** under the stat. 55 Geo. 3, c. 194, for penalties for practising as an apothecary without the authority of a certificate, as required by that statute. Plea, nil debet. At the trial, before *Maule* B. at the Liverpool summer assizes, 1839, the plaintiffs gave evidence of the defendant having attended persons suffering from fever and other complaints, having administered medicines to them, and made a charge for such medicines. It appeared that the defendant was a chemist and druggist. No evidence was given to shew what was the proper duty of a chemist and druggist, and the learned judge told the jury that, though the defendant might have done acts which amounted to practising as an apothecary, still if they were also within the scope of the office or duty of a chemist and druggist, according to the practice of that trade at the time of the passing of that statute, there was no infringement of it, as the 28th section enacted that nothing in it contained should extend to affect the business of a chemist and druggist, but that persons exercising that trade should carry it on then as fully and amply as before the passing of the act (b). The jury found a

(b) "That nothing in this act construed to extend, to prejudice or contained shall extend or be con- in any way to affect the trade or

verdict for the defendant. In Michaelmas term following, *Cresswell* obtained a rule for a new trial, on the ground that the learned judge had misconstrued the statute, inasmuch as there was nothing in the language of the 28th section of it to authorise a chemist and druggist to act as an apothecary as the defendant had done; and that, the plaintiffs having established a case of practising as an apothecary, it was for the defendant to bring himself within the 28th section, if he could, the protecting proviso being in a clause distinct from that containing the prohibition.

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 GREENOUGH.

*W.H. Watson* now shewed cause. It was a question of fact whether the act done was within the practice of a chemist and druggist. It was formerly held that none but a physician could direct the administration of medicines; *College of Surgeons v. Rose* (a). That was overruled in the House of Lords (b). The apothecaries and chemists were no doubt, at the time of the passing the statute, two distinct classes of practitioners, the former being the better educated and the better qualified to practise. The statute was intended to regulate the former class, and prevent the latter class from holding themselves out as belonging to it; and, if they do not do so, there is nothing in the statute to prevent their administering medicine to a person willing to receive it from their hands. The chemists were of inferior pretensions. The defendant here did not hold himself out to be an apothecary, and make a charge in that capacity, as the defendant appears to have done in *Allison v. Haydon* (c).

business of a chemist and druggist, in the buying, preparing, compounding, dispensing and vending drugs, medicine and medicinable compounds, wholesale and retail; but all persons using or exercising the said trade or business, or who shall or may hereafter use or exercise the same, shall and may use, exercise and carry on the same trade or business in such manner,

and as fully and amply to all intents and purposes, as the same trade or business was used, exercised or carried on by chemists and druggists before the passing of this act."

(a) 6 Mod. 44.

(b) 1 Br. P. C. 78, fol. edit.

(c) 4 Bing. 619; S. C. 1 M. & P. 588.

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There was no objection to the defendant's visiting patients and giving his opinion on their cases if he made no charge for doing so, but charged for the medicine only. A physician cannot charge for medicine, though he may prescribe it; a chemist may charge for medicine, even if he cannot maintain a demand for his advice.

*Cresswell, J. L. Adolphus and F. Robinson*, contra, were stopped by the Court.

LORD DENMAN C. J.—The plaintiffs established a *prima facie* case at least. If the defendant relied on the practice which prevailed before the passing of the act, it was for him to shew it.

PATTESON J.—There cannot be the least doubt about this case, unless it is to be contended that an apothecary and a chemist are the same thing.

WILLIAMS J. concurred.

COLERIDGE J.—The construction contended for would lead to this absurdity, that the apothecaries, admitted to be the better educated class, would be subject to regulations from which the chemist and druggist would be free.

G.

Rule absolute (a).

(a) The case was tried again at Liverpool summer assizes, 1841, before *Wightman J.*, when the plaintiffs obtained a verdict, which no attempt was made to disturb.



1841.

*Tuesday,  
May 25th.*

MASON v. PAYNTER, Esq.

**CASE.**—The declaration stated the issuing of a writ of habere facias possessionem out of this Court, which reciting the recovery in an action of ejectment of a term of years in certain land &c., in the county of Surrey, and in the bailiwick of the defendant, who was the sheriff of the said county, by *John Doe*, on the demise of the plaintiff, commanded the defendant “that, without delay, he should cause the said *John Doe* to have possession of the said term.” The declaration, setting out that the said judgment in ejectment was on the demise of the plaintiff, and in his behalf, and the duty of the defendant to be to execute the writ in a reasonable time and without delay, alleged a neglect of the defendant to execute it within a reasonable time in that behalf, although the plaintiff then tendered and offered to the defendant so to point out and shew to him the said tenements, and to take and accept from him the possession thereof, and of the said term, and although a reasonable time for the defendant to execute the said writ had long since, and before the commencement of this suit, elapsed; “nevertheless the defendant, so being such sheriff as aforesaid, not regarding his duty as such sheriff, but wrongfully intending to injure the plaintiff in this behalf, and to delay him, and to prevent him from having possession of the said tenements, and put him to costs and expenses, did not, nor would, within the said reasonable time, execute the said writ, and cause the said *John Doe*, or the plaintiff, to have possession of the said tenements, or of the said term therein, and wrongfully and unjustly, and in breach of his duty in that behalf, delayed the execution of the said writ, for divers, to wit, five days next after the said writ was so delivered to him as aforesaid, whereby the plaintiff hath been and is greatly injured, and by means of the premises incurred and was put to, and hath lost and been deprived of, great costs,


Judgment had been signed for the plaintiff in an action of ejectment. The lessor caused to be issued and delivered to the sheriff a writ of habere facias. He then made an appointment with the sheriff for the purpose of executing the writ. The sheriff having been informed, by the defendant's attorney, that the proceedings were irregular, and would be set aside, did not execute the writ. The judgment was afterwards set aside, on an affidavit of merits:—Held, that the lessor of the plaintiff was entitled to recover, in an action on the case against the sheriff, the costs he had incurred in preparing to assist the sheriff to execute the writ.

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charges and expenses, amounting, to wit, to 20*l.*, in and about, by himself and others, performing and sojourning in divers journies, in order to point out and shew to the defendant the said tenements, and to take and accept from the defendant the possession thereof, under the said writ, and otherwise in and about the preparing and making ready to accept and take that possession."

Pleas: 1st, not guilty; 2dly, a traverse of the issuing of the writ; and 3dly, "that after the said writ in said declaration mentioned had been so delivered to him the defendant, as such sheriff as aforesaid, in due form of law to be executed, as in the said declaration is mentioned, and before the commencement of this suit, and before the effluxion of a reasonable time, for him the defendant, as such sheriff as aforesaid, to execute the said writ, that is to say, on the day next but one following the day on which said writ was so delivered to the defendant, as such sheriff as aforesaid, in due form of law to be executed as aforesaid, to wit, on the 9th February, 1839, the Honourable Sir *Joseph Littledale*, Knight, then and still being one of the justices of the said Court of our said Lady the Queen, before the Queen herself, by a certain summons in writing, under his hand, and bearing date the day and year last aforesaid, and made by him the said Sir *Joseph Littledale*, Knight, so being such justice as aforesaid, in the said cause mentioned in the said writ in the said declaration mentioned, did require the attorney or agent of the plaintiff to attend him, at his chambers, in the Rolls Gardens, on the Monday then next, at 11 o'clock in the forenoon, to shew cause why the judgment signed in the said cause mentioned, in the said writ in the said declaration mentioned, and the said writ in the said declaration mentioned should not be set aside, of which said summons the defendant, as such sheriff as aforesaid, on the day and year last aforesaid, had notice, and thereupon afterwards, and before the commencement of this suit that is to say, on the Tuesday next following the said Monday in the said summons mentioned, to wit, on the 12th

February, in the year last aforesaid, the Honourable Sir *John Patteson*, Knight, then and still being another of the justices of the said Court of our said Lady the Queen, before the Queen herself, by a certain order in writing, under his hand, and bearing date the day and year last aforesaid, and made by him the said last-mentioned justice, in the said cause mentioned in the said writ in the said declaration mentioned, did order that the said summons, thereinbefore mentioned and referred to, should be postponed till Friday next, and that in the meantime all proceedings in the said cause mentioned, in the said writ in the said declaration mentioned, should be stayed, of which said order the said defendant, as such sheriff as aforesaid, afterwards, to wit, on the day and year last aforesaid, had notice; and that afterwards, and before the commencement of this suit, that is to say, on the day next following the said Friday, in the said order mentioned, to wit, on the 16th day of February, in the year of our Lord 1839, the said last-mentioned justice, by a certain other order, made in the said cause mentioned, in the said writ in the said declaration mentioned, in writing under his hand, and bearing date the day and year last aforesaid, did order, that upon payment of costs, to be taxed, the judgment signed in the said cause mentioned, in the said writ in the said declaration mentioned, and the said writ in the said declaration mentioned, should be set aside, the landlord to plead and enter into the consent rule within a week, of which said last-mentioned order the defendant, as such sheriff as aforesaid, afterwards, to wit, on the day and year last aforesaid, had notice. And that afterwards, and before the commencement of this suit, to wit, on the 20th February, in the year of our Lord 1839, the said costs in the said last-mentioned order were duly taxed at the sum of 12*l.* 17*s.*, and which said sum of 12*l.* 17*s.* was afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, paid to the plaintiff, *John Mason*, of all which said last-mentioned premises the defendant, as such sheriff as aforesaid, afterwards, to

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wit, on the day and year last aforesaid, had notice, whereupon he the defendant, as such sheriff as aforesaid, did not execute the said writ in the said declaration mentioned, and did delay the execution thereof, as in the said declaration is mentioned, as he fully might for the cause aforesaid, and this he the defendant is ready to verify, &c.

There was a fourth plea, also stating in a different form the setting aside of the judgment and writ. Replication: *similiter* and *de injuriâ*.

At the trial before Lord *Denman* C. J., at the sittings after Michaelmas term, 1839, it appeared that a judgment in ejectment, regular according to the practice of the Court, had been signed in favour of the present plaintiff, for the recovery of certain land in Surrey. On the 7th February, 1839, a writ of *habere facias possessionem*, founded on the judgment, was lodged at the sheriff's office in town, the warrant was forwarded to the officer by post the same evening. On the morning of the following day, the plaintiff's son called at the sheriff's office to make an appointment for the execution of the writ. The officer made an appointment for Saturday, the 9th of February, at 11 o'clock, for that purpose. This appointment he did not keep, on the ground that he had notice of a summons taken out before a judge, to set aside the judgment. The first summons was not attended, and on the 11th February a similar summons was taken out, of which the defendant had also notice; the hearing of this summons was adjourned, and on Saturday, 16th February, the judge made an order, setting aside the judgment and writ of possession, but only on payment of costs, the proceedings appearing to be regular. The costs of the ejectment were taxed and paid, but the Master disallowed certain costs, about 20s., incurred by the plaintiff in procuring the attendance of certain men to assist the sheriff, at the time appointed, in giving the plaintiff possession of the premises under the writ. The Lord Chief Justice directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for any damages sustained

by him, by reason of the non execution of the writ. In Hilary term following, *Kelly* obtained a rule accordingly, against which,

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*Pashley* now shewed cause(a). This is an action against the sheriff for a neglect of duty, in omitting to execute a writ of habere facias possessionem, by which the plaintiff alleges that he has sustained damage. The complaint is open to a double answer; first, the sheriff had a reasonable time to execute the writ, and that reasonable time had not elapsed; and secondly, the plaintiff sustained no damage by non execution of the writ. A sheriff has a reasonable time to execute a writ, and he is not liable to an action for not executing it on the first opportunity that presents itself, unless some damage is sustained by the execution creditor thereby: *Com. Dig. Temps, (D), Moreland v. Leigh(b), Carlile v. Parkins(c), Aireton v. Davis(d), Jacobs v. Humphry(e), Randell v. Wheble(f)*. The judgment of the Court in the last case shews that, if the writ had been executed before the return, though after the default, no action would have been maintainable against the sheriff, unless some special damage had been shewn to have arisen from the intervening neglect, and the sheriff ought not to be placed in a worse situation by the proceedings, which were regular, being set aside, than he would have been if they had continued in force, and he had retained the custody of the writ for the purpose of executing it. Lord *Tenterden*, in *Carlile v. Parkins(c)*, held the sheriff's liability to arise only where he is guilty of delay without any reasonable or probable cause. And in this case, therefore, even if there were delay, he is not liable. The information given to him, that the judgment would be set aside, afforded a reasonable ground

(a) Before Lord Denman C. J.,  
*Patteson, Coleridge and Wight-*  
*man Js.*

(b) 1 Stark. 388.

(c) 3 Stark. 163.

(d) 9 Bing. 740; S. C. 3 M. &  
 Scott, 138.

(e) 2 C. & M. 413.

(f) 10 A. & E. 719; S. C. 2 P.  
 & D. 602.



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for delay, though it may be true that the sheriff would have been protected by the writ alone, however irregular the other proceedings might have been: *Barker v. Braham* (a). [Patteson J. The judgment was not set aside for irregularity, it was a valid judgment at the time the writ was in the hands of the sheriff, and the question, what were the legal rights of the plaintiff and the sheriff at that time, is not affected by the subsequent setting aside of the proceedings by the Court, as a matter of favour.] The sheriff was still entitled to pause upon receiving such a suggestion; it would have been a sufficient discharge of his duty, if he had executed the writ within a period which, under all the circumstances of the case, was a reasonable one.

The plaintiff has nothing to complain of but that his costs of collecting men for the purpose of assisting the sheriff in the execution of the writ were disallowed, but he has no ground of complaint for that cause; the sheriff's duty was to execute the writ. For that purpose he might have called out the whole posse comitatus, and the plaintiff's costs were therefore incurred by him of his own wrong. A plaintiff, even if he has a right of action for costs he has been put to, cannot recover more than the law would allow him in the proceeding he has taken; *Sinclair v. Eldred* (b). The real ground of the plaintiff's complaint is, the non allowance by the Master of these costs upon the taxation or setting aside the proceedings, and the objection, if any, being to that taxation, ought to assume the form of a motion to review the Master's taxation.

*Kelly and Miller*, *contrà*. The judgment was obtained, and the writ of execution issued, under circumstances which

(a) 3 Wils. 371. One of the grounds alleged for a new trial in that case was excessive damages, and Serjeant *Davy*, in shewing cause, cited a case in which some "printers' devils were unlawfully

imprisoned, for a week only, and during that time lived well upon beef steaks and porter, and the jury gave them 300*l.* a piece damages."

(b) 4 Taunt. 7.

shew that the plaintiff was entitled to the full benefit of them; and, even if the judgment had been irregular, the sheriff ought to have executed the writ, and not he, but the plaintiff and his attorney would have been liable in an action for the consequences: *Codrington v. Lloyd (a)*. [Coleridge J. If this writ had been executed, should you have obtained these costs?] We should then have had possession, and they were disallowed expressly on the ground that the writ had not been executed. The amount of damage is immaterial; it is sufficient, if in contemplation of law some damage has been sustained, and the loss of possession for even a short time, is sufficient to support this action. The cases of wrong to title are exceptions to the general rule, that *damnum* and *injuria* must concur, in order that an action may be maintained.

*Cur. adv. vult.*

Lord DENMAN C. J. (June 10) delivered the judgment of the Court.—This was an action against the sheriff for not executing a writ of *habere facias possessionem* in proper time. The plaintiff had gone down with the writ and warrant, and some persons to assist in putting it in force, and delivered it to the officer, desiring it might be executed immediately. The officer refused, being told by the defendant's landlord that he should set aside the judgment for irregularity. Afterwards the judgment was set aside, not for irregularity, but upon payment of costs by the landlord, who was let in to defend by a judge's order. The Master, in taxing those costs, disallowed the expenses of the plaintiff in trying to have the writ executed upon the very ground that the writ had not been executed. This action is brought principally to recover those costs which would have been allowed if the sheriff had done his duty, and executed the writ when required.

It is now contended for the sheriff, that he has a reasonable time to execute every writ. No doubt he has, but

(a) 3 A. & E. 449; S. C. 3 N. & P. 442.

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that does not excuse him in refusing to execute a writ when he has the opportunity, is required to do it, and nothing occurs to prevent him. Then it is said that application should have been made for the Master to review his taxation of costs, but such application could not have succeeded, for the writ had not been executed, owing to the sheriff's misconduct.

The rule asks only for a verdict for so much of these costs as the Master shall think reasonable. Perhaps the loss of possession for a few days might also entitle the plaintiff to some damages, but they could be but trifling, and no leave was reserved as to them.

G.

Rule absolute.

Saturday,  
May 22d.

The QUEEN v. The Mayor and Corporation of NEWBURY.


If a corporation refuse compensation to a removed corporate officer, on the ground that they had removed him for cause sufficient, the Lords of the Treasury have no jurisdiction to try the question of the sufficiency, and though after entertaining that question, and determining it in favour of the

claimant, they also adjudicate upon the proper amount of compensation, this Court will not enforce, by mandamus, the payment of such compensation, nor try, upon the return to a writ of mandamus, the sufficiency of the cause, the claimant being bound in the first instance to proceed against the corporation by mandamus, to compel them to restore him or give him compensation for removal.


*Semble*, that to justify the removal of a corporate officer, there must be misconduct specially in the execution of his office, and that misconduct in duties which he has performed for the corporation, but which are not necessarily any part of his official duty, is not sufficient.

certain office of profit within the same (that is to say), the office of town clerk of the said borough, and during all the time aforesaid was and acted as town clerk of the said borough, and received the fees and emoluments of and pertaining to the said office of town clerk of the said borough. And that under the provisions of the said act of parliament, he the said *Robert Baker* ceased to hold his said office of town clerk on the said 31st day of December, and that he was duly reappointed to the said office of town clerk of the said borough, under the provisions of the said act, on the 12th day of August, then next ensuing. And that he the said *Robert Baker*, in pursuance of the said reappointment, continued and acted as town clerk of the said borough until on or about the 18th January, but that on the last mentioned day and year he was removed from his said office of town clerk, by the council of the said borough, for a cause other than such misconduct as would warrant removal from an office held during good behaviour, and hath ever since ceased to be such town clerk as aforesaid, whereupon he the said *Robert Baker* became entitled to have an adequate compensation, to be assessed by the council of the said borough, and paid out of the borough fund, for the salary, fees and emoluments of such last mentioned office, regard being had to the manner of his appointment to the said office, and his term or interest therein, and all other circumstances of the case, according to the provisions of the said act of parliament. And that afterwards, to wit, on the 10th day of March, in the said first year of our reign, he the said *Robert Baker* did prefer his claim for such compensation to the council of the said borough, and did deliver to the proper officer of the said borough a statement under his hand, setting forth the amount received by him in such office of town clerk of said borough in every year, during the period of five years next before the passing of the said act of parliament, on account of the salary, fees, emoluments, profits and perquisites, in respect whereof he claimed such compensation, and distinguishing the office, place, situation,

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employment or appointment, in respect whereof the same had been received by him, and containing a declaration that the same was a true statement, according to the best of his knowledge, information and belief, and also setting forth the sum claimed by him as such compensation. And that the said statement was duly laid before the council of the said borough, in pursuance of the said act of parliament, who thereupon afterwards, to wit, on the 5th day of June, in the said 1st year of our reign, took the same into consideration and determined to disallow the said claim, and that the same was accordingly disallowed by them. And that thereupon the said *Robert Baker*, having been duly informed of such determination, in pursuance of the said act of parliament, and thinking himself aggrieved thereby, did appeal to the Lords Commissioners of the Treasury against such determination of the said council, in pursuance of the provisions of the said act of parliament, and that such proceedings were had and taken in the matter of the said appeal, that the said Lords Commissioners, on or about the 23d day of January, made an order in writing, signed by three of them, and did thereby, in pursuance and under the authority of the said act, order and determine that the said *Robert Baker* should receive an annuity of 107*l.*, such annuity to commence from the time when he was removed from the said office of town clerk, as therein aforesaid, and to continue for his life, as compensation for the salary, fees and emoluments of the said office of town clerk of the said borough. That the sum so awarded and ordered to be paid to the said *Robert Baker*, as such compensation as aforesaid, ought to be secured to him by bond or obligation, under the common seal of the said borough, in a sufficient penalty, conditioned for the payment to him, his executors, administrators or assigns, of such sum, with all arrears thereof accrued due before the date of such bond. That such bond or obligation ought to be prepared and executed at the expense of the borough fund of the said borough, and delivered to the said *Robert Baker* as soon as

conveniently might be after the said order and determination of the said Lords Commissioners of our Treasury, according to the act of parliament. That a convenient and reasonable time for the preparing, executing and delivering the said bond or obligation as aforesaid had long since elapsed, and that the said *Robert Baker*, since the making of the said order by the Lords Commissioners of our Treasury as aforesaid, and after the lapse of such convenient and reasonable time as aforesaid, required and demanded of the said mayor, aldermen and burgesses of the said borough, to prepare, execute and deliver to him such bond or obligation, for securing payment of such annuity of 107*l.* awarded to him as compensation for the loss of the said office of town clerk, from which he was removed as aforesaid, together with all arrears accrued due thereon before the date of such bond or obligation, but that the said mayor, aldermen and burgesses of the said borough wholly refused and neglected, and still do refuse and neglect to prepare and execute any such bond or obligation as aforesaid, and the same remains unprepared and unexecuted in contempt &c., and to the damage and prejudice of the said *Robert Baker*. The writ then commanded the said mayor, aldermen and burgesses of the said borough of Newbury, immediately after the receipt of the writ, to prepare and execute a bond or obligation, under the common seal of the said borough, in a sufficient penalty, conditioned for the payment to the said *Robert Baker* of the said annuity of 107*l.*, and deliver the same to the said *Robert Baker*.

The corporation returned, that the said *Robert Baker*, after his reappointment to the office of town clerk of the said borough, had been removed by the corporation for such misconduct as would warrant removal from any office held during good behaviour. They then stated the circumstances of the alleged misbehaviour, which arose in the management of certain informations filed in Chancery against the corporation existing before the passing of the Municipal Corporation Act, as trustees and visitors of certain charities, and

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in which said information and supplemental informations the trustees afterwards appointed were made defendants. The return then stated that *Robert Baker*, down to the time of his removal, held and exercised, together with his office of town clerk, the office of attorney and solicitor to the corporation, and acted as such during that time in the suits above mentioned, and that he was likewise employed as solicitor in the said supplemental suit. The return then alleged improprieties in being indebted to the corporation in a sum of 1000*l.*, without paying or accounting for the same, and an impropriety in the accounts in blending a sum of 500*l.*, part of the charity funds, with the corporation accounts. The return also stated the filing of certain petitions in the supplemental suit, in opposition to express instructions to suspend proceedings, on the ground that negotiations were pending, by which the negotiations were impeded, and the charities subjected to heavy costs.

The return further stated, that the council of the borough for these causes did dismiss the said *Robert Baker*, after hearing him, and having resolved that the same would warrant his removal from any office held during good behaviour. The return further stated, that, on the ground that he was dismissed for sufficient cause, the council did disallow his claim for compensation, and on his appeal to the Treasury did appear and inform the Lords of the Treasury of the ground of such disallowance.

The case was argued upon a concilium in Hilary term (a), by

Sir *J. Campbell* A.G. for the prosecutor. The provisions of the act 5 & 6 *Will.* 4, c. 76, s. 66, for the compensation of officers not reappointed are illusory, if the corporation can evade them by reappointing their officers and subsequently dismissing them at pleasure. It may be conceded that the Lords of the Treasury have no jurisdiction

(a) Wednesday, Jan. 27, before Lord *Denman* C.J., *Littledale*, *Patteson* and *Coleridge* Js.

over this matter, if there were a good ground of removal, *Reg. v. The Corporation of Warwick*(a); but, if not, then they had jurisdiction, which in this case they have exercised by finding the amount of compensation to which the claimant is entitled. The cases of *Reg. v. The Corporation of Poole*(b) and *Reg. v. The Corporation of Bridgewater*(c) are not opposed to this argument. The return in this case shews no sufficient ground of amotion. There must be an act of misconduct against the duty in the office; *Bagg's* case(d). The misconduct here, if any, is in the management of the chancery suit, and misconduct in one office is no ground for removal from another: *Rex v. Chalke*(e), *Rex v. The Mayor of Doncaster*(f), *Rex v. Carlisle*(g).

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*J. L. Adolphus* contra. This is an attempt to overrule the decision in the case of *Reg. v. The Corporation of Warwick*(a). The mandamus requires the corporation to execute a bond for certain sums, founded on an adjudication of the Treasury, which having been pronounced without jurisdiction is void. It is not disputed that the Treasury have no jurisdiction to award compensation if there were good ground of amotion. But how are they to know whether the grounds of amotion were good or not, they having no jurisdiction to inquire into the validity of them? Their jurisdiction is ousted by it being brought to their knowledge that the dispute is not the amount of compensation, but the right to any compensation. The claimant ought, on the refusal of the corporation to make him compensation, to have applied to this Court for a mandamus either to restore or compensate him: the corporation would then have returned their causes of amotion, and their validity might have been inquired into by this Court, which is the competent tribunal to determine that question. The corporation, knowing the Lords of the Treasury had no jurisdiction until that

(a) 10 A. & E. 386; S. C. 3 P. & D. 439.

(b) 3 N. & P. 119.

(c) 2 P. & D. 504.

(d) 11 Co. 93.

(e) 1 Ld. Raym. 225.

(f) 2 Ld. Raym. 1564.

(g) 8 Mod. 99.



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was determined, could not be called upon to produce evidence before them on the question of compensation, on the ground that it might eventually appear that the Lords of the Treasury would have jurisdiction to determine it.

Sir *J. Campbell* A. G. in reply. The Lords of the Treasury have jurisdiction to try the question of amount of compensation, and have done so; and, even supposing that to have been done *de bene esse*, it became good on its appearing that the corporation had no right to remove the claimant. The Court can now say whether the grounds assigned are sufficient.

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—This was a mandamus to affix the corporate seal to a bond for securing an annuity of 107*l.* as compensation for the office of town clerk, being the amount awarded by the Lords of the Treasury, after appeal made to them by the prosecutor, on the ground that he had been removed without sufficient cause, within the 66th section of the Municipal Reform Act. The return sets out the cause of amotion, which consists of several imputed improprieties in the conduct of the town clerk, in reference to the mode of keeping his account of certain money belonging to the corporation, and also in his management of chancery suits, wherein he acted as their solicitor. We are disposed to think the charge of misconduct insufficient, as not being shewn in any manner to have been connected with the office of town clerk, and also as containing no imputation of improper motives. But the facts appearing in the writ and return fail to shew the prosecutor entitled to the annuity awarded. The corporation removed as for misconduct, the appeal was against that amotion, and we have already decided, more than once, that no appeal on that ground lies to the Lords of the Treasury, their jurisdiction being confined to the question, whether the compensation, when the body corporate has

awarded one, is adequate and just. It is true that in this case the Lords have not only adjudged the amotion bad, but have also awarded that compensation, for securing which the bond is required: but this question of amount, the only one that belongs to them, does not appear to have been brought before them by the interested parties. It was argued that the award was contingently made, but this does not appear to have been the course of proceeding, nor do we find any statement that the corporation either consented that it should be so, or have even been heard on the question of amount.

G.

Judgment for the defendants.

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GREEN and others v. SMITHIES.

Tuesday,  
May 25th.

**ASSUMPSIT.** The first count was on a bill of exchange, of which the plaintiffs were indorsees. There were also the common counts for goods sold and delivered, and on an account stated. The defendant pleaded to the first count, traversing the notice of dishonour, and to the residue he pleaded a payment into Court of 5*l.* 17*s.*, and denied any liability ultra; on which issue was joined. The particulars of the plaintiffs' demand were in the following form:—

The particulars of the plaintiffs' demand, in an action of assumpsit on a bill of exchange, and for goods sold and delivered, stated goods sold and delivered to the amount of 42*l.* 5*s.*, they then gave credit for a bill of 36*l.* 8*s.*, and to the balance of 5*l.* 17*s.* added a further sum of 10*l.* 18*s.* for goods, and to the amount of the two sums (16*l.* 15*s.*) added, the amount of 36*l.* 8*s.* "for the bill mentioned in the

This action is brought to recover the sum of 54*l.* 10*s.* 6*d.* upon the following account:—

|                                                                                                                               | £. | s. | d. |
|-------------------------------------------------------------------------------------------------------------------------------|----|----|----|
| March, 1839. Various items for goods delivered .                                                                              | 42 | 5  | 0  |
| April 8. By bill . . . . .                                                                                                    | 36 | 8  | 0  |
|                                                                                                                               | 5  | 17 | 0  |
| May. Goods . . . . .                                                                                                          | 10 | 18 | 0  |
|                                                                                                                               | 16 | 15 | 0  |
| July. To amount of bill of exchange dated 26th of Apr. 1839, indorsed by you, and mentioned in the said declaration . . . . . | 36 | 8  | 0  |
| To expenses upon returned bill. . . . .                                                                                       | 1  | 7  | 6  |
|                                                                                                                               | 54 | 10 | 6  |

declaration, and indorsed by the defendant." Held, that the defendant could not avail himself of the transfer of the bill to the plaintiff without an appropriate plea, as the two items in the particulars, with respect to the bill, destroyed each other, so that there was no admission of payment.

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At the trial at the Liverpool summer assizes, 1840, the defendant had a verdict on the first count, and the plaintiffs on the other counts, damages 47*l.* 5*s.*, leave being reserved to the defendant to move to reduce the damages by a sum of 36*l.* 8*s.*, on the ground that the particulars gave the defendant credit for a bill of that amount, which was equivalent to a plea of payment, supported by evidence of that fact. A rule having been obtained accordingly,

*W. H. Watson (a)* shewed cause. The defendant has no right to rely on the credit given for the bill in the particulars without looking at the other items in them, which shew the real state of the account, and that, though at a particular stage of it he was entitled to credit for the bill, that credit was subsequently put an end to by the bill, which merely suspended the original claim, being dishonoured. The debit of the bill returned was put in the particulars for that purpose, it was unnecessary to put it in the particulars for any other. The omission of it would not prevent the plaintiffs from recovering upon it: *Cooper v. Amos (b)*.

*Dundas and J. Bayley* contra. Giving a bill of exchange, which the other party makes his own by laches, is equivalent to all intents and purposes to payment: 3 & 4 *Ann.* c. 9, s. 7. The fact that a bill of exchange has been given is *prima facie* evidence of payment: *Hebden v. Hart-sink (c)*, *Boswell v. Smith (d)*. The particulars therefore do admit a *prima facie* case of payment, the effect of which is not avoided by a subsequent debit of the bill, such debit in itself not having the effect of defeating the admission of a payment. To give it that effect, it must be shewn that the plaintiffs had taken due course to obtain payment thereof.

*Cur. adv. vult.*

(a) Before Lord Denman C. J.  
*Patteson, Williams and Coleridge*  
 Js.

(b) 2 C. & P. 267.  
 (c) 4 Esp. 46.  
 (d) 6 C. & P. 60.

Lord DENMAN C. J. delivered the judgment of the Court.—In this case the first count being abandoned, the plaintiff proves goods sold and delivered to the amount of 53*l.* 3*s.*—of this 5*l.* 17*s.* is paid into Court, and the verdict has been taken for 47*l.* 6*s.* the balance—but defendant says, I am entitled also to deduct a bill drawn by me and indorsed to plaintiff for 36*l.* 8*s.*, which plaintiff has made his own by laches in not giving notice of dishonour. The plaintiff says you should have pleaded that, and cannot give it in evidence under non-assumpsit. The answer is, I could not; your particulars admit it. On looking at the particulars, they give credit for the bill in the first instance, but then debit it again, as returned dishonoured. They must be taken altogether, and then there is no admission of payment at all. The case is the same as if the bill had not been mentioned at all in the particulars, the two items destroy each other. The rule must be discharged.

G.

Rule discharged.

DEWAR and another v. SWABEY and another.

Saturday,  
June 19th.

**ASSUMPSIT.**—The declaration contained three counts: 1, on a special contract; 2, for money had and received; 3, on an account stated.

*Semble*, where on summons to strike out one of several counts, as founded on the

same subject-matter of complaint, the judge, being satisfied, on cause shewn by the plaintiff, allows both counts, on the ground that it is intended to establish a distinct matter of complaint under each, and the plaintiff succeeds at the trial on an issue arising out of one only of the counts so allowed, if the judge at nisi prius certifies, under Reg. Gen. Hil. 4 Will. 4, r. 7, that it was not bona fide intended to establish distinct matter of complaint on the several counts, the certificate will deprive the plaintiff of all the costs of the cause.

*Held*, where there are three counts, and on summons to strike out the 1st or 2d, they are allowed to stand, on the ground of plaintiff's intention to establish a distinct complaint under each, if the plaintiff at the trial succeeds on the 2nd and fails on the 1st and 3d, a certificate, under rule 7, that he did not intend to establish a distinct matter of complaint "in respect of *either* of the counts on which he has *failed*," is inoperative, because it does not apply to the two counts in respect of which the summons was taken out.

After trial and judge's certificate it is too late to object to an order, allowing two counts, that it was improperly made, because the counts were not in apparent violation of rule 5.

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The defendants took out a summons to shew cause why the first or second count should not be struck out, which was attended before *Patteson J.* The learned judge, after hearing counsel on behalf of the plaintiffs, dismissed the summons, with an indorsement that he was "satisfied, upon the cause shewn, that some distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each of the counts."

The pleas were, 1, non assumpsit to the whole declaration; 2, to the first count, a traverse of the breach. Issues joined.

At the trial the cause was referred to the arbitration of a barrister, with power to certify for a special jury, and with the same power that a judge at *nisi prius* would have to certify that no distinct subject-matter of complaint was *bonâ fide* intended to be established in respect of each count; the costs of the cause to abide the event of the award. The arbitrator, by his award, directed a verdict to be entered for the defendants on the first and last counts of the declaration, and upon the second plea to the first count; but for the plaintiffs on the second count, damages 395*l.* 10*s.* 8*d.* He then certified that the cause was fit to be tried by a special jury, and that no distinct subject-matter of complaint was *bonâ fide* intended to be established "in respect of either of the counts upon which the plaintiffs have failed." In March, 1841, costs were taxed. The defendants insisted that the certificate disentitled the plaintiffs to any costs whatever. The master "allowed the plaintiffs the costs of the cause, including the costs of the issue found for them, but disallowing so much of the plaintiffs' costs as related to the issues found for the defendants," subject to the opinion of the Court. A rule *nisi* having been obtained by the defendants to review the taxation,

*Cresswell* and *Greenwood* now shewed cause (a). 1st, The certificate was inoperative, because it was founded on an order which the judge had no authority to make. The

(a) Before Lord Denman C. J., *Patteson*, *Williams* and *Coleridge J.*s.

1st and 2nd counts do not appear, on the face of them, to be "founded on one and the same principal matter of complaint," within the prohibition of Reg. Gen. Hil. T. 4 *Will. 4, General Rules and Regulations*, 5 (a). They are not, therefore, "used in *apparent* violation" of that rule, so as to warrant an application to a judge, under rule 6, for an order to strike out one of those counts. [Coleridge J. You construe "apparent" as synonymous with "on the face." But all counts are made to appear different on the face of them; that criterion therefore would leave all the mischief contemplated by the rule untouched. Counts for goods bargained and sold, and for goods sold and delivered, differ on the face of them, yet the particulars may shew that they both include the same demand.] Identity of matter of complaint, as presented on the record, would place the counts in apparent violation of the rule, and that would seem to be the true criterion. The plaintiff's ability to recover on both is no criterion, for rule 5 expressly allows several counts in some cases, where, from the nature of the complaint, the plaintiff cannot recover on both. *Temple v. Keily* (b) and *Vaughan v. Glenn* (c) shew that counts founded on the same transaction may be allowed, if the identity of their subject-matter is not manifested by the record. [Coleridge J. Is it open to you now to object to the propriety of the judge's order? You might have applied to the Court to set it aside.] It was in the plaintiffs' favour. [Coleridge J. Yes, but conditioned with a severe penalty, if they failed to prove a distinct subject-matter of complaint. The language of the 7th rule is very clear. If you can now question the order, the master, on taxation, may do so likewise. You went to trial with the yoke round your neck. Patten J. The order allowing the counts complained of to stand is not made, unless the plaintiff enters before the judge on the summons into an explanation why he wishes to retain them. He may refuse an explanation, and say,

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(a) 3 N. &amp; M. 2.

(b) 9 Dowl. P. C. 62.

(c) 5 M. &amp; W. 577.

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"I insist on keeping the counts without the peril I shall incur from the allowance;" and if the judge then ordered one of the counts to be struck out, as he probably would, the plaintiff might apply here to rescind that order, and the matter would come regularly before us. But after he has shewn cause on the summons, and acquiesced in the allowance of the counts, what right has he now to complain of the consequences?] If it is open to him to question the order, it will be as convenient to do so at this stage of the cause as at any other; for by waiting the result of the trial, he may find it unnecessary to apply. [Lord *Denman* C. J. We entertain no doubt that you cannot now question the propriety of the judge's order. That is also plain from the words of rule 7, as well as from a consideration of the manifest convenience of all parties.]

Secondly, the certificate of the arbitrator is defective for ambiguity. He was authorised to certify, if he saw occasion, that the plaintiff did not intend to establish any distinct subject-matter of complaint under the first and second counts, which were the counts allowed on summons. But he has certified that the first and third counts were intended to embrace the same subject-matter, on which no question had been made. The certificate is inoperative.

Thirdly, the plaintiffs are, at all events, entitled to the general costs of the cause. By rule 7, if the plaintiffs fail to establish a distinct complaint in respect of one of several counts, and a verdict passes against them on that count, they are liable for the costs of the *evidence and pleadings* occasioned by that count. And the latter part of that rule increases that penalty, on certificate of the judge at *nisi prius*, by depriving the plaintiff of the costs upon all the issues on which he succeeds. The phrase "costs of the issues" must be limited to those of the pleadings and evidence, and cannot extend to the general costs of the cause, such as the costs of a special jury or the court fees. [*Patteson* J. What is there to hang their claim for costs upon, if not upon any issue?] They have the verdict, and it would

be unjust to deprive them of the general costs. [Lord Denman C. J. The 7th rule is a very strong one undoubtedly, and underwent much discussion at the time of making it. The penalty is severe, and possibly disproportionate in some instances. *Patteson J.* I always explain to parties, on these occasions, the peril they are in.] The rule seems to contemplate that the plaintiff has succeeded on some issue which will carry the general costs.

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*Peacock* contra. The plaintiffs were required by the summons to satisfy the judge that they intended to prove at the trial distinct matters of complaint under each count. They failed in that proof, and they lose the costs of the cause. [*Patteson J.* The arbitrator was to certify as to *the counts allowed*. He has not mentioned the second.] He has done so in effect, for it was the standard of comparison. [*Patteson J.* Distinct matters of complaint in respect of *each count so allowed*, must mean here distinct as between the first and second count. It was of no importance whether they were distinct on comparison of the first and third.] The plaintiffs succeeded on the second count, which had been allowed; the arbitrator, in effect, compares with it both the first and third counts, and finds that neither under the first count (which had been allowed) nor under the third was there a distinct complaint, i. e. distinct from the second count. As to the costs, there is no issue found for the plaintiffs on which they can be recovered. [*Coleridge J.* But the costs of the special jury are independent of the result of the cause.] They must follow the fate of the issues. [*Coleridge J.* The plaintiffs have a verdict and a certificate for a special jury. They have succeeded on one issue, though they are deprived of the costs on it; but you must contend that the costs of a special jury are inseparably connected with those on the issue.]

*Cur. adv. vult.*

LORD DENMAN C.J., at the sittings after this term (June 17), delivered the judgment of the Court.—In this case,



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the indorsement on the summons for striking out either the first or second counts allowed them both to stand, the judge being satisfied that some distinct subject-matter of complaint was *bonâ fide* intended to be established in respect to each. The summons did not apply to the third count at all. The arbitrator, to whom the cause was referred, with the same power of certifying as to the costs that a judge would have had, has directed a verdict for the plaintiffs on the second count, and for the defendants on the first and third, and certified his opinion that it was not *bonâ fide* intended to establish a distinct subject-matter of complaint, in respect of either of the counts on which the plaintiffs have failed, that is, the first and third, but he makes no mention of the second.

Now his certificate, by the rule of Court, is to be confined to those counts which have been allowed by the judge; it should therefore have been confined to the first and second counts. By introducing the third and omitting any express mention of the second in his certificate, he has confused the matter, and rendered it doubtful what he really means. The word "distinct" in the indorsement institutes a comparison between the first and second counts; the word "distinct" in the certificate may be intended to do the same, but it does not in express terms do so, and therefore we think it unsafe to give effect to the certificate by reason of an ingenious argument, by which it was attempted to shew that it was so intended. Under these circumstances, we think that the master was right in giving no effect to the certificate.

With respect to the effect of it, if it had been properly found, we have no doubt that, as the plaintiff succeeded on no issue but that to which the certificate would have related, the plaintiff would have been deprived of all the costs of the cause.

Rule discharged (a).

(a) See *Head v. Baldrey*, 3 P. & D. 625.

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## ARBOVIN v. ANDERSON (a).

**ASSUMPSIT** by the indorsee of a bill of exchange against the acceptor.

The declaration stated that one *Rogers*, on &c., made his bill of exchange, drawn upon and accepted by the defendant, for the sum of 250*l.*, payable to the order of the drawer, three months after the date thereof; that *Rogers* indorsed to one *Mansell*, and *Mansell* indorsed the same to the plaintiff.

Plea: that the bill was, for the accommodation and at the request of *Mansell*, and without any consideration or value, drawn and indorsed by *Rogers*, and also accepted by the defendant; and that there never was any consideration or value whatever, either for the drawing or indorsing by *Rogers*, or for the accepting thereof by the defendant, or for *Rogers* or either of them, paying the amount of the said bill, or any part thereof; and that there never was any consideration or value whatever for the said indorsement by *Mansell* of the bill, or for *Mansell* paying the amount of the bill, or any part thereof. Verification.

Replication: that the indorsement by *Mansell* was an indorsement in blank, and not a full or special indorsement ordering the said sum of money in the said bill mentioned to be paid to any particular person or persons, or to his, her or their order, or otherwise; and that after the indorsement by *Mansell*, and before the bill became due, certain persons, to wit, Messrs. *Rcay*, who then appeared to be, and whom the plaintiff then believed to be, the lawful holders of the said bill, and entitled thereto, delivered the same to the plaintiff, with the said indorsements of *Rogers* and *Mansell* thereon, upon and for a good and sufficient consideration, and for value, to wit, for the amount of the bill, and the plaintiff then took and received the same for such good and sufficient consideration, and without notice of the said premises in the plea mentioned.

(a) Decided in Easter term last (May 4).

Declaration by indorsee against the acceptor of a bill of exchange, drawn by *R.*, indorsed to *M.*, and by *M.* indorsed to the plaintiff.

Plea: that there was no consideration for the drawing or accepting of the bill, or for the indorsements.

Replication: that the indorsement by *M.* was in blank, and that, after such indorsement, *X.*, who then appeared to be, and whom plaintiff believed to be, the lawful holder of the bill, delivered it to plaintiff for value and without notice:—*Held*, on special demurrer, that the replication was not a departure, and was good in confession and avoidance of the plea.


*Seemle*, that the plea was bad on special demurrer for not alleging that plaintiff gave no consideration for the bill.

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Special demurrer: the causes assigned were, that the replication neither traverses or denies, nor confesses and avoids the plea, inasmuch as the defendant hath, in that plea, alleged that there never was any consideration or value whatever for the said acceptance, or for either of the indorsements, or for the defendant, *Rogers* and *Mansell*, or either of them, paying the amount of the bill, or any part thereof; and the replication does not shew that there ever was any value or consideration for the said acceptance, or for either of the indorsements, or for any or either of these three persons paying the bill; that the replication does not shew that there was any sufficient consideration for the delivery of the bill by Messrs. *Reay* to the plaintiff, or what was the consideration or the nature of it, or how or by or to whom the amount of the said bill, which is said to be the consideration for such delivery, was paid, or in what manner such amount was a consideration for such delivery; that the replication neither denies nor confesses and avoids the plea, nor anything therein alleged; that the replication does not positively allege that Messrs. *Reay* were holders or proprietors of or entitled to the bill of exchange, but only alleges that they appeared, and the plaintiff believed them to be the lawful holders of the bill, and entitled thereto, which is not a sufficient or proper averment that the said Messrs. *Reay* were the lawful holders of the said bill, &c. and entitled thereto, and no good or sufficient or proper issue can be taken thereon; that, Messrs. *Reay* not appearing to be parties to the said bill, their delivery of it to the plaintiff will not enable him to maintain the action; that it does not appear in the replication that there was any consideration for the acceptance or indorsements in the bill, or for the defendant's paying that sum, &c.; that the fact of a consideration passing between persons not parties to the bill does not entitle the plaintiff to maintain this action; that the replication is a departure from the declaration, for that the declaration alleges an indorsement to the plaintiff from *Mansell*, and the replication alleges the indorsement from

Messrs. *Reay*; and also, that the plaintiff claims in the declaration as indorsee of *Mansell*, and the replication sets forth a different title; that it sets forth different causes of action from those stated in the declaration; that the consideration in the replication mentioned, might be sufficient for the indorsement by Messrs. *Reay*, but could not have been a consideration for the acceptance or the indorsements in the declaration mentioned, the acceptance and indorsements being prior to and unconnected with the consideration and value in the replication mentioned; and that the replication is argumentative, &c. Joinder in demurrer.

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*Gunning*, in support of the demurrer. The replication discloses no right of action in the plaintiff. He declared on the bill as indorsee of *Mansell*; the plea alleged that there was no consideration for the indorsement. The plaintiff ought to have replied that he gave value to *Mansell*, which he has not done. [*Patteson* J. Is the plea good? Suppose this very bill had been drawn, accepted and indorsed by the several parties mentioned in the declaration, for the accommodation of *A.*, a stranger, and *A.*, as the holder, had delivered it, without his indorsement to the plaintiff for a loan of money. That state of facts would be consistent with your plea, but would it be an answer to the action? If the plea had alleged that the plaintiff had notice of those facts, and had not given value for the bill, the case might be different.] The plaintiff cannot raise that objection, because it is ground of special demurrer, and has not been stated in the margin of the Paper Books: *Parker v. Riley* (a). The plea is good on general demurrer, because the indorsement by *Mansell* may have been a special indorsement to the plaintiff, and the plea alleges that there was no value for that indorsement. Again, conceding that the lawful holder of a bill, payable to bearer, may confer a title by delivery, the replication does not state that *Reay & Co.* were lawful holders. It contains

(a) 3 M. & W. 230.

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only an argumentative allegation to that effect, on which no material issue can be taken.

*Mellor* contra. The plea is bad, if consistently with its allegations a state of facts can be supposed on which the plaintiff can recover. [Lord *Denman* C. J. Your objections to this plea are not stated in the margin of the Demurrer Book, as they ought to have been, in some general terms, at least.] This objection is matter of substance; it is not stated that the plaintiff is not a bonâ fide holder for value, or that he had notice of the facts alleged. It affords no answer to the action, *Goodman v. Harvey* (a), and is bad on general demurrer. The replication is explanatory of the declaration, and not a departure from it.


*Gunning* in reply. As the replication does not allege that *Reay & Co.*, through whom the plaintiff claims title, were the lawful holders of the bill, the case must be considered as if they had feloniously obtained it, and then the plaintiff cannot recover. [*Patteson* J. Have you any authority that plaintiff must shew a good title in *Reay & Co.*? The case of stolen goods may be different, but it has been held that a bonâ fide holder for value of a transferable negotiable instrument, indorsed in blank, may recover, though delivered to him by one who had stolen it: *Peacock v. Rhodes* (b).]

LORD DENMAN C. J.—The mode of stating, in the replication, that Messrs. *Reay* were the lawful holders of the bill, may not be very usual, but I am not prepared to say it is incorrect. Then supposing, in the language of the plea, that there was no consideration for the drawing, accepting or indorsing of the bill, the replication states that the indorsement by *Mansell* was an indorsement in blank, and that after the indorsement and before the bill became due,

(a) 4 A. &amp; E. 870; S.C. 6 N. &amp; M. 372.

(b) 2 Dougl. 633.

*Reay & Co.* delivered the bill to the plaintiff, with the indorsements for value, and that the plaintiff took it without notice of the premises. Acting on the doctrine in *Goodman v. Harvey* (a) that the holder of a bill, *bonâ fide* taken from one who had fraudulently disposed of it, may recover, the mere possession purporting to be a good title until impeached, our judgment must be for the plaintiff.

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PATTERSON J.—The replication is good by way of confession and avoidance. The plea may be sufficient on general demurrer: whether it would be so on special demurrer it is not necessary to determine. The plea states that the bill was drawn by *Rogers* on and accepted by the defendant, and was indorsed by *Rogers* to *Mansell*, who indorsed without a good and sufficient consideration, but it does not go on to state to whom *Mansell* indorsed, or whether, after such indorsement, it was stolen from *Mansell*, or was lost by him, but merely that he indorsed it. Now, as the plaintiff did not take the bill from *Mansell*, I do not see how he could traverse the facts stated in the plea, unless he knew that the person who received the bill from him gave value for it. But he replies, “I admit that the facts alleged may be all true, but the indorsement by *Mansell* was an indorsement in blank, and the bill was in the hands of *Reay & Co.*, who appeared to be the lawful holders, and I gave them value for it.” The defendant might have rejoined that *Reay & Co.* stole or found the bill, and that the plaintiff was aware of it. The only doubt I have felt is, whether there was a sufficient allegation that *Reay & Co.* were the lawful holders, and that is made a special ground of demurrer; but, on consideration, I do not see how the plaintiff could have stated more, because, as the pleadings stood, he was not bound to state that they were the lawful owners. He has alleged that they appeared and he believed them to be so, which is sufficient. The defendant in his rejoinder might have impeached their title.

(a) 4 A. & E. 370; S.C. 6 N. & M. 372.

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WILLIAMS J.—If the plaintiff had declared on a special indorsement from *Mansell* to him, a plea that he gave no consideration would have been an answer; but to this plea it was enough for the plaintiff to reply that he gave value for the bill to the holders of it.

WIGHTMAN J.—The plea is bad on special demurrer, and I doubt if it would not be bad on general demurrer. It professes to set up a want of consideration as a defence to the action, and yet, consistently with all the allegations in it, the plaintiff may have given value for the bill.

Judgment for the plaintiff.

Tuesday,  
June 1st.

NEWTON v. CONSTABLE, Bart. and others.

A barrister, who has been actually engaged at petty sessions, but without *previous* retainer, for a defendant in a case of summary conviction, where counsel are allowed by 6 & 7 Will. 4, c. 114, is not privileged from arrest *redeundo*.

CASE for maliciously taking the plaintiff under a *ca. sa.* while privileged as a barrister, at the suit of one *R. I.* in an action on promises.

The first count of the declaration, after setting out the judgment, the delivery of the writ to the defendant *Constable*, as sheriff of Yorkshire, and of the sheriff's warrant to the officer in the usual way, stated, that the plaintiff at the time of the committing of the grievances, to wit, on the 4th day of September, 1840, and, to wit, for three years and upwards then next previously, was a barrister at law of the English bar, duly called thereto, and as such barrister was actually practising at the bar of the superior courts at Westminster, and at the bar of the courts of assize and nisi prius, of oyer and terminer, and general gaol delivery in the northern circuit, usually holden in and for the county of York at the Castle of York. And the plaintiff, to wit, on the day and year last aforesaid, and to wit, for three years then next previously was also as such barrister as aforesaid actually practising at the bar of the

several courts of general quarter sessions of the peace, of special sessions of the peace, and of petty sessions of the peace usually holden for the city and borough and liberty of Ripon, in the county of York, at the common hall in the said city and borough.

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The declaration then stated, that before the committing the grievances, &c. to wit, on the 4th September, 1840, at a petty session held for the borough and city of Ripon, by two justices, one *John Shields* appeared in obedience to a summons, &c. to answer a charge of assault and battery, contrary to the statute, &c. And the plaintiff was then there present in his proper place in the said court of petty session as such barrister as aforesaid, actually practising at the bar of the said court; and the said *Shields* did then and there retain and employ the plaintiff as such barrister to defend and act for and to aid and assist the said *Shields* with his, the plaintiff's, counsel and advice in and about the defence of the charge mentioned in the said summons. And the plaintiff did accordingly then and there accept the said retainer and employment of the said *Shields* aforesaid, and the said summons and charge then and there came on to be and was heard and determined before the said two justices so assembled and met in petty session as aforesaid. And the plaintiff on the said hearing and on the said summons and charge, as such barrister as aforesaid, in pursuance of and under his said retainer and employment before the said court of petty session so held by and before the said two justices, did defend the said *Shields*, and act for and assist him with his, the plaintiff's, counsel and advice in and about the defence of the said charge. And immediately after the hearing and determination of the summons and charge (the said court being then adjourned, to wit, on the said 4th day of September, 1840,) the plaintiff left the said court of petty sessions for the purpose of returning directly to his said residence (previously described as being in the borough of Ripon), being his place of residence nearest to the said court, and was then and there in the



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act of returning from the said court directly by the shortest route to his said residence, and during his said returning home from the said court, the plaintiff had and enjoyed by law the full and ample privilege and protection from all and every arrest on civil process whatsoever, of all which premises the defendants before and at the time of the committing of the grievances by them as hereafter mentioned had notice; yet the defendants, well knowing the premises, but wilfully and maliciously devising, contriving and intending to deprive the plaintiff of his said privilege and protection, and to oppress, harass and injure the plaintiff in his fame and credit, and to bring him into public scandal, and to cause and procure him to be illegally imprisoned and detained by the said sheriff under the said writ of *ca. sa.*, and thereby to impoverish, oppress and wholly ruin him, to wit, on the day and year last aforesaid, knowingly, wilfully, maliciously and unlawfully did, while the plaintiff was in the said act of returning home to his said residence from the said court, and in the manner as aforesaid, and before he had returned home, and whilst the plaintiff had and enjoyed by law privilege and protection from arrest on civil process, arrest the plaintiff by his body, and take him into custody under colour and pretence of the said writ and warrant. And the defendants, although then and often requested, &c. so to do, did not nor would release the plaintiff, &c., but, on the contrary thereof, the defendants then and there did unlawfully, wilfully and maliciously keep the plaintiff in the said custody, and imprison the said plaintiff, and keep and detain him in prison in the common gaol of the said county, and elsewhere, under colour and pretence of the said writ and warrant for a long time, to wit, for the space of three weeks then next following, and the plaintiff was so unlawfully, wilfully and maliciously imprisoned by the defendants until he, the plaintiff, caused himself to be removed from the said gaol by a writ of *habeas corpus*, and taken before the Honourable Sir *Robert Mounsey Rolfe*, Knight, one of the barons of her


Majesty's Court of Exchequer, who did on the 26th day of September, in the year of our Lord 1840, make an order that the said sheriff should discharge (a) the now plaintiff out of his custody forthwith, whereupon the said sheriff discharged the now plaintiff as he was commanded. By means of which said several premises, &c.

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The second count stated, that the plaintiff attended the session as a barrister, "having by law and by the practice of the said court right of audience and audience in all cases of summary conviction in the said court. And the plaintiff being then there attending in his place as such counsel as aforesaid, did then and there advise and counsel the said justices upon a certain point of law arising and coming into question in the said court, to wit, to defer the hearing of the complaint," &c. (stating the assault case in the first count mentioned. This count then went on to state the arrest of the plaintiff on his return home from court, as in the first count mentioned).

The third count stated, that at the time of the committing of the grievances, &c. "to wit, on the 4th September, 1840, and for three years and upwards then next preceding, the plaintiff was an inhabitant householder, to wit, at, &c. within the said city and borough of Ripon, and that the said two justices then duly held a certain special session of the peace for the said city and borough, called the general annual licensing meeting, otherwise called the brewster sessions, for certain special purposes, that is to say, for the purpose of renewing and granting certificates for alehouse and other licenses," &c. under the 9 Geo. 4, c. 61. And the plaintiff, as such barrister and as such inhabitant householder as aforesaid, to wit, on the day and year last aforesaid, was attending the court of special session both in his capacity of counsel learned in the law, entitled to be of counsel, and as such inhabitant householder as aforesaid, having a direct interest in the proceedings, and having audience in the said court according to law and to the

(a) After, as was stated in argument, consulting with *Parke*, B.

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practice of the said court. And the plaintiff then and there remained for some time, to wit, for the space of two hours, in his proper and accustomed place and attendance upon the said court." This count then went on to relate the circumstances of the arrest as in the other counts.

General demurrer and joinder.

The points of which the defendants gave notice for argument were the following:—"The defendants will contend as to all the counts that they are bad for the following among other reasons, viz. that, if the defendants were acting under the writ of ca. sa., they were justified in arresting and detaining the plaintiff notwithstanding any claim of privilege until he was discharged by the authority of the court as stated; and, if they were not acting under the writ, they were trespassers, and the action is misconceived.

"The defendants will also object to each of the counts respectively that no sufficient ground of privilege is shewn."

*Kelly* in support of the demurrer (a). No action for the arrest of a privileged person has ever been sustained. Even if such an action can be brought, the form of it should be trespass and not case.

But the plaintiff in the present case was not privileged at all. A barrister, as a barrister, has no privilege, unless on occasions which clothe him with the authority of the Court. He is protected while attending the Court on account of the duties he has to perform towards the Court. It is because the privilege does not attach to a barrister personally that the Court deals summarily by discharging him, and that no action lies.

At all events a barrister is privileged for the purpose of performing his professional duties in the superior Courts only. In the superior Courts it seems he is privileged, whether he has been actually employed or not; but those Courts hear none who are not barristers, and unless they

(a) The case was argued before Lord Denman C.J., *Patteson*, *Williams* and *Coleridge* Js.

were privileged in relation to those Courts. The suitor might be deprived of a hearing. The reason for the privilege, therefore, does not extend to inferior Courts. The privilege of a witness in all Courts is absolutely essential to the administration of justice. [Sir *W. W. Follett*. By 6 & 7 *Will.* 4, c. 114, s. 2, in cases of summary conviction by magistrates counsel may be heard.] It does not appear that the occasion of the plaintiff's arrest was after the passing of that act. If a barrister is to be privileged to attend all courts, whether superior or inferior, and whether employed there or not, he may go on from Court to Court, and eke out his privilege for ever. [*Coleridge J.* If it is the privilege of the Court that protects a barrister, can he be discharged by a different Court from that which he has been attending previously to his arrest?] On principle he cannot. [*Patteson J.* It was done in *Willingham v. Matthews* (a).]

The action is wrong in form. In *Stokes v. White* (b) it was held that case would not lie for arresting the plaintiff while attending as a witness at a trial. It is true that the declaration did not aver malice, but malice in the trespasser will not affect the form of action. If an arrest were made without any writ at all, or if the defendant had also struck the plaintiff, the circumstance of the arrest or the blow being malicious would not make it proper to sue in case instead of trespass. The whole question of privilege might be raised on the record in trespass as well as in case; the defendant would justify under the writ, and the privilege would be replied.

Sir *W. W. Follett* contra. The privilege of a barrister is established by the case of Mr. *Hippisley*, mentioned in *Meekins v. Smith* (c), *Luntley v. —* (d), and *Watson v. Carroll* (e).

(a) 6 Taunt. 356.


(b) 1 C., M. &amp; R. 223.

(c) 1 H. Bl. 636.

(d) 1 C. &amp; M. 579; S. C. 2 Dowl.

P. C. 51.

(e) 4 M. &amp; W. 592.

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Such a privilege is not the privilege of the Court, it is a privilege connected with the administration of justice, and extends to every Court: *Meekins v. Smith* (a) and *Rex v. Blake* (b).

An action lies at the suit of a privileged party for his arrest, although the Court also may punish it as a contempt. In the present instance the action can be sustained beyond all doubt, for the maliciousness of the arrest is admitted on the record. *Whalley v. Pepper* (c) is a case where an action was sustained for maliciously arresting a privileged person; and in *King v. Taylor* (d) it appears that Parke B. discharged a privileged person on condition that he should *not* bring any action for the arrest. In *Stokes v. White* (e), where such an action failed, it did not appear that the defendant acted maliciously, or had even notice of the privilege. Independently of privilege a malicious abuse of process is actionable: *Saxon v. Castle* (f), *Gratner v. Hill* (g), and *Heywood v. Collinge* (h).

Case is the proper form of action. Trespass would not lie, for the process was not void, there was merely an irregularity in the time of acting upon it: *Cameron v. Lightfoot* (i), *Tarleton v. Fisher* (k). The defendant has maliciously done a wrongful act, by which the plaintiff has suffered special damage: this is the subject of case.

*Kelly* in reply. The case of *Whalley v. Pepper* (c), which is the only case where an action for the arrest of a privileged person has been sustained, was merely a *nisi prius* decision, subject to a motion, which was never made. A return by the sheriff that the plaintiff was privileged

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|-------------------------------|-------------------------------|
| (a) 1 H. Bl. 636.             | (g) 4 Bing. N. C. 212.        |
| (b) 4 B. & Ad. 355.           | (h) 9 A. & E. 268; S. C. 1 P. |
| (c) 7 C. & P. 506.            | & D. 202.                     |
| (d) 2 C., M. & R. 235.        | (i) 2 W. Bl. 1190.            |
| (e) 1 C., M. & R. 223.        | (k) 2 Doug. 671.              |
| (f) 6 A. & E. 652; S. C. 1 N. |                               |
| & P. 661.                     |                               |

would not have been a good return. The sheriff was bound to arrest.

*Cur. adv. vult.*


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LORD DENMAN C. J., at the sittings after this term (June 16), delivered the judgment of the Court.—The plaintiff declared against the defendant, the sheriff of Yorkshire, for maliciously and without reasonable cause arresting him, with notice that he was privileged from arrest, because he was at the time returning from his attendance as a barrister at a court of petty sessions at Ripon, to which he had gone with the view of being engaged to practise, and while there had been engaged as advocate on behalf of a person who was brought before the Court on a charge of assault.

On general demurrer a very protracted argument was held, whether the form of action was proper, defendant saying that, if any could be maintained, trespass was the proper remedy. We need not decide this, because we are clearly of opinion that the supposed privilege does not exist in law. The attendance of parties and of witnesses has been always protected. It is absolutely necessary for the ends of justice that their attendance should be privileged, because without it justice cannot be administered. But the protection of legal officers is of a different character, and may well be confined within narrower limits. That of barristers attending the superior Courts is explained in the case of *Collier v. Hicks* (a), as depending upon prescription; the extent of it is not very clearly defined. When they have been actually engaged in the business of the Court, they are certainly privileged: how far this might be the case when the attendance was merely in the exercise of their profession afforded for the benefit of such suitors as might choose to engage them, but without actual engagement, no reported case has decided. There are traditions in Westminster Hall, to which reference is made in *Meekins v. Smith* (b). But this privilege, to whatever extent allowed

(a) 2 B. & Ad. 663.

(b) 1 H. Bl. 686.

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before the year 1833, may be traced to the recognised position and duties of the bar in Westminster Hall and on the circuits, where the same bar practise under the judges of the land. In that year a barrister, who had been arrested on his return from sessions, was discharged on motion by the Court of Exchequer; *Luntley v. —* (a). But on that case it is to be observed that the privilege was admitted at the bar without any discussion, the issue raised on the affidavits being whether defendant at the time of arrest was actually on his way home from the sessions; and farther that it was decided on the authority of *Meekins v. Smith* (b) above mentioned. Now that case decides no such point. It only refused the privilege to a person who went to Westminster Hall to justify as bail, and was arrested on his return, the Court saying it did not apply to *all* engaged in a cause. The judges stated their recollection of former discharges of barristers, but with the qualification before adverted to. We are aware of the 6 & 7 Will. 4 and 1 Vict. c. 114, s. 2, by which persons accused and liable to summary conviction are empowered to make their defence before justices of the peace by counsel and attornies. But no provision is made for exempting them from arrest, and we find it difficult to believe that the legislature intended to give to every party accused (possibly by implication to every prosecutor), the privilege of protecting barristers and attornies from arrest. The result would be, that every barrister and every attorney might almost at all times escape from the effect of an execution against his person, for there is hardly any period at which any person in professional practice might not be said to be attending some court, or going to or returning from it under the privileges formerly allowed, and so enlarged. But we are of opinion that the privilege cannot go beyond those previously engaged to attend such inquiries, and does not protect such as, without previous engagement, voluntarily go to the petty sessions in the hope of finding a client.


(a) 1 C. & M. 579; S. C. 2 Dowl. P. C. 51.

(b) 1 H. Bl. 636.

We are aware that in this very case two of our learned brethren thought the present plaintiff was entitled to his discharge, and directed it on habeas corpus; but, on communication with them, we do not find them very strongly convinced that their view was correct, and the authorities which have been brought before us have failed to establish the large exemption claimed.

*D.*

Judgment for defendant.

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RICHARDSON v. DUNN.

*Monday,  
 May 24th.*

**ASSUMPSIT** for goods bargained and sold. Plea: non assumpsit. At the trial before *Maule B.*, at the summer assizes, 1839, at Liverpool, a correspondence between the plaintiff and defendant, and other facts, as follow, were in evidence.

To the plaintiff from the defendant:

"Southampton, Nov. 17, 1838.

Sir,—Capt. *Woodcock*, of the 'Navigator,' has mentioned your name as fitter of the 'Old Etherley unscreened coals,' and I shall therefore be obliged by your shipping as early and as low as possible, from 200 to 300 tons of them, either by 'Navigator' or other vessel. I am, &c."

Answered by the following letter from the plaintiff to the defendant:

"*Wm. Dunn*. Respected friend,—We have to acknowledge thy favour of 17th instant, and in reply beg to say, we are the only shippers of Old Etherley; the price is 7*s.* 6*d.* per ton, but owing to the excessive overweight they only stand

A written contract was entered into for the purchase of "200 or 300" tons of coals, to be sent by the "Navigator or other vessel." The vendor, residing at Stockton-on-Tees, on the 31st December, 1838, shipped 127 tons of coals by the George and Henry, and on that day wrote to the vendee at Southampton, to state what he had done, and that he should draw on him for the amount. The George and

Henry was sunk at sea on 6th January, 1839, which fact the vendor, on the 10th January, communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, and he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor:—*Held*, that his silence, after receiving the vendor's statement of the mode in which he had performed the contract, operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for.



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to about 6s. to 6s. 2d. At present we have no light ships in, but expect a fleet daily, when thy order shall have due attention. We annex a list of all coals shipped by us.

We remain, &c."

The defendant not writing again, the plaintiff, on the 31st December, 1838, shipped on board a vessel called the *George and Henry*, forty-eight chaldrons of Old Etherley coals, and on the same day sent to the defendant the following letter and invoice :

" Stockton, 12 Mo. 31st, 1838.

" Respected friend,—Annexed we hand thee invoice of *George and Henry's* cargo, which we have no doubt will give satisfaction; she has 13s. 3d. per ton freight, but you will observe she loaded at Stockton, by which you save 3d. per ton in the coals. We are sorry we have been so long in executing this order, but we have had so many holidays lately, we could not do it sooner. We have drawn for the amount at two months, as usual, payable in London. We think she will weigh out about 152 tons. As this vessel is so very small, please say whether we are at liberty to engage another, to make up the quantity. We remain, &c."

" Middlesbrough and Stockton-on-Tees, 12 Month, 31st, 1838.  
*Wm. Dunn,*

Per Ship *George and Henry*, of Stockton, *W. Campbell*, Master,  
 To *Edw. Richardson & Co.* Dr.

|                                                                                                  | £.         | s.       | d.       |
|--------------------------------------------------------------------------------------------------|------------|----------|----------|
| To 48 Cha <sup>s</sup> or 127 $\frac{1}{2}$ tons Old Etherley uns <sup>d</sup> Coals, at 7s. 3d. | 46         | 2        | 2        |
| Stamp . . . . .                                                                                  | 0          | 2        | 6        |
|                                                                                                  | <u>£46</u> | <u>4</u> | <u>8</u> |

By our draft upon thee at two months, } £46 4 8  
 payable in London . . . . . }

The *George and Henry* sailed from Stockton on the 4th January, 1839, on her voyage to Southampton, and on the 6th January, while lying at anchor in the Yarmouth Roads, was run down and sunk by another vessel. On the 10th January, the plaintiff communicated this fact by letter to the defendant. The defendant returned no answer to the plaintiff's letter of the 31st December. The bill mentioned

in the plaintiff's letter of the 31st December was not presented to the defendant until after he knew of the loss, and he then refused to accept it. The plaintiff had applied to the owners of the *Navigator* to carry the coals, and they had refused to do so. The *Navigator* would have held about twenty tons more than the *George and Henry*. It was objected on the part of the defendant that the plaintiff must be nonsuited, on the ground that the shipment by the *George and Henry* was not in compliance with the contract, and that the defendant was therefore not bound to accept the coals, and had done nothing to signify his acceptance. The learned baron, reserving leave to the defendant to move to enter a nonsuit, left it to the jury to say whether the contract expressed in the letters did not give some latitude to the plaintiff, and authorise him to send by another vessel as well as by the *Navigator*, if circumstances required it, or whether in the estimation of mercantile men the contract restricted the plaintiff to send by the *Navigator* only, or a vessel of dimensions sufficient to carry the whole at once. The jury found a verdict for the plaintiff.

*Cresswell*, in the Michaelmas term following, obtained a rule to shew cause why a nonsuit should not be entered, pursuant to the leave reserved.

*Knowles* shewed cause (a). There are two questions for the Court. Was a shipment of the 127 tons of coal such a compliance with the contract as to oblige the defendant to accept them; and 2dly, if not, was there not a waiver by the defendant of his right to demand a strict performance of the contract? Both these questions are subservient to another, whether the judge had not a right to leave the question of the construction of the contract to the jury. First, the shipment of 127 tons was in pursuance of the defendant's directions. There is no mention of a precise quantity to be shipped, the letter saying 200 or 300 tons,

(a) On Monday, May 24, before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

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nor is any precise time for the shipment stipulated. A delivery at several times would be a sufficient pursuance of the contract. In order to arrive at a proper construction of this contract, all the circumstances surrounding it at the time it was made must be taken into consideration, and, that being so, the question of construction was properly left to the jury. "Where the agreement is not contained in any formal instrument, but is collected from letters which have passed between the parties, their construction, when it is plain and unambiguous, is for the consideration of the Court; but where they are written in so dubious and uncertain a manner as to be capable of different constructions, and can be explained by other circumstances, it is for the jury to decide on the whole of the evidence (a)." *Power v. Barham* (b) is a strong authority in favour of this doctrine. But supposing the question of construction in this case to be for the judge, and not for the jury, the right construction has been put upon it. This case is not like that of *Walker v. Dixon* (c), where, on the delivery of a part and a refusal to deliver the residue, it was held that nothing could be recovered for the part delivered; but, even if that case were in point it is no longer of authority, it was overruled in the case of *Oxendale v. Wetherell* (d). Here no time was mentioned for the delivery of the entire quantity; and, even if there were a contract for a larger quantity, the defence was not put on the ground that the defendant was entitled to have the whole delivered before he was called upon to pay for a part.

Whatever the meaning of the contract might have originally been, the defendant has waived the right to the performance of it in any manner other than that in which it has been performed. The coal was shipped on the 31st December, and the invoice was sent to the defendant the same day. This was in his possession a week before he repudi-

(a) 1 Stark. on Evid. 463.

(c) 2 Stark. 281.

(b) 4 A. &amp; E. 473; S. C. 6 N. &amp; M. 62.

(d) 9 B. &amp; C. 386; S. C. 4 M. &amp; R. 429.

ated the contract as performed, and that was clearly an after-thought, on receiving intelligence of the loss of the vessel. It cannot be doubted that, if the vendor had shipped in exact performance of the contract, the delivery on board the stipulated vessel would have vested the property in the vendee. This delivery must have the same effect, as the vendee was informed of what had been done, and had ample opportunity to signify his non-acceptance of such delivery, if he had thought proper.

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*Cresswell* and *W. H. Watson* contrâ. The construction of this instrument ought not to have been left to the jury. It does not fall within the definition of either of the two classes of cases in which the construction of a written instrument may be put to the jury. No doubt, when the meaning is to be gathered from extrinsic circumstances, the whole must go to the jury together. This is done in mercantile contracts, where particular phrases have by custom a particular meaning, as in the case where evidence has been received to shew the sense which particular expressions bore in a bought and a sold note, and that both notes meant the same thing (a). But conceding that the construction is a question for the jury, where the contract is written in a dubious manner, because it may then be explained by evidence, what is the doubt or ambiguity in this case which lets in such evidence, and so calls for the opinion of the jury? The case of *Power v. Barham* (b) had nothing to do with the admissibility of parol evidence, it was an action on a warranty, which is not by law required to be in writing, and the parol evidence was receivable in conjunction with the other evidence upon the question, whether there was a warranty or not. Nor is there any waiver by which the defendant can be made answerable in this action. If the contract has not been performed according to its terms, the defendant can only be liable by a new contract implied

(a) *Vide Bold v. Rayner*, 1 M. & W. 343.

(b) 4 A. & E. 473; S. C. 6 N. & M. 62.

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from an acceptance of a varied performance, or by a valid substitution of fresh terms by express contract. The silence of the defendant on the receipt of the plaintiff's letter, cannot have any such effect.

*Cur. adv. vult.*

Lord DENMAN C. J. delivered the judgment of the Court, at the sittings after term (June 19).—In this case, upon a motion for leave to enter a nonsuit or a verdict for defendant, some points were discussed which it will not be necessary for us to express any opinion upon. The defendant had sent an order to the plaintiff to ship, as early and as low as possible, from 200 to 300 tons of coals by the Navigator, or some other vessel. The Navigator could not carry so much as 200 tons, but she was otherwise freighted, and the plaintiff by another vessel sent 152 tons; they were shipped on the 31st December, and on the same day an invoice was sent and letter to the defendant, which requested to know if the plaintiff should ship more by another vessel, and informed him that a bill was drawn on him for the amount of the coals then shipped; this letter would be received on the 2d or 3d of January at latest; the vessel with the coals was run down and lost on the 6th January. The defendant sent no answer to the letter, nor in anyway repudiated the act done by the plaintiff until nearly a week after, when he heard of the loss. Under these circumstances, the plaintiff sued the defendant for goods sold and delivered, and, if the coals in proper quantity had been sent by the Navigator, there can be no doubt that a delivery of them on board that vessel would have been a delivery to the defendant; that they would on board that vessel have been at his risk, and that this action might have been maintained.

Assuming that the plaintiff was not authorised to send a smaller quantity, or by any other vessel than the Navigator, or one capable of carrying the whole quantity ordered, still, if the defendant has waived the objection to the departure of

the plaintiff from the proper compliance with the order, he must be in the same condition as if it had been precisely executed. Had the coals arrived and been accepted by the defendant, no doubt he must have paid for them; had he in terms assented to the mode in which the plaintiff had proceeded to execute the order, the same consequence would have followed. And it was contended, for the plaintiff, that the defendant's conduct amounted to an acquiescence in what the plaintiff had done; the letter of the plaintiff inclosed the invoice, and informed him that a bill had been drawn, it therefore became his duty, it was said, without any delay, to inform the plaintiff that he dissented from this mode of executing his order; that no more coals were to be sent, and that he would not accept the bill. Silence for a week, and until he knew of the loss, was tantamount to assent. For the defendant it was said that he was not bound to answer the letter, or express any opinion, until the bill arrived. We cannot agree to this: the fact of the bill having been drawn on him was, we think, an additional reason for a prompt communication. We are therefore of opinion that the verdict for the plaintiff should not be disturbed, and the rule will be discharged.

G.

Rule discharged.

The QUEEN v. The Justices of CARNARVONSHIRE (a).

**RULE** to shew cause why a writ of mandamus should not issue, directed to the justices of the peace for the county of Carnarvon, commanding them to enter continu-

A ground of appeal was stated to be that the respondent parish acknowledged the

(a) Decided Michaelmas term, November 23rd.

pauper to be an inhabitant of and legally settled in their parish, by relieving him and his family during the last six years out of the parish, and particularly during the years 1839 and 1840, while he and his family resided at Liverpool:—*Held*, to be sufficiently explicit, the facts stated being more within the knowledge of the respondents than of the appellants.

The Court of Queen's Bench will issue a mandamus to hear an appeal, if the sessions have refused to hear upon an erroneous decision as to the sufficiency of the grounds of appeal.

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ances, and try an appeal by the parish officers of Gyffym against an order for the removal of *Mary Roberts* and her children. It appeared upon the affidavits that this appeal was entered for trial at the October Carnarvonshire Quarter Sessions: it was respited to the next sessions. On the appeal coming on for hearing, it was objected that the statement of the grounds of appeal was too general, and that the appellants could not therefore be allowed to go into evidence in support of their case. The Court of Quarter Sessions allowed the objection. The grounds of appeal were stated as follows:—

That the said *David Roberts*, the pauper's husband, is not legally settled in the appellant parish.

That the said *D. Roberts* is legally settled in the respondent parish.

That the respondent parish have acknowledged the said *D. Roberts* to be an inhabitant of and legally settled in their parish, by relieving the said *D. Roberts* and the said paupers, as part of his family, from time to time during the last six years, whilst the said *D. Roberts* and the said paupers were resident (in other places) out of the respondent parish, and particularly by giving relief to the said *D. Roberts* and the said paupers, as part of his family, several times in the years 1839 and 1840, during which time he and his family were residing in the town of Liverpool, in the county of Lancaster.

That the said *D. Roberts* is settled in the respondents' parish by apprenticeship and service with *Robert Hughes*, then of the town of Conway, shoemaker, deceased, (and referred to in the examination in this case,) under a legal indenture of apprenticeship, made and executed between the several parties therein named.

*Jervis* and *Welsby* now shewed cause. First, the statement of the grounds of appeal was bad for generality; and secondly, the Court of Quarter Sessions are a competent tribunal to determine that question, and their decision cannot be reviewed.

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The third is the only ground of appeal in the statement which can be said to approach to sufficient particularity; but that shews no valid ground. The facts stated do not necessarily lead to an inference that the pauper was settled in the respondent parish; and, if they do, that is an improper mode of making the statement, which ought to set out the legal effect of the facts, and not the facts themselves. They may or may not support the inference of a settlement, which the appellants are bound to assert and state positively. The statement is too vague, that the appellants have relieved from time to time within six years: the time ought to have been mentioned. The places out of the parish, where they are said to have relieved the paupers, ought to have been named. There is an attempt to remedy this defect, by stating that relief has been given during the years 1839 and 1840 in Liverpool; but that statement gives no more information than the other. The respondents could not make inquiry into the facts: they could not know to what precise period to direct their inquiry, nor how to ascertain whether *Roberts* lived at Liverpool at all. To say that a pauper resided in so large a place as Liverpool, without further precision of statement, is to give no information at all. The rate was accessible to them, and they had therefore the means of giving all information. [*Rex v. Sussex* (a), *Reg. v. West Riding* (b), *Reg. v. Middleton in Teesdale* (c), *Reg. v. Bridgewater* (d), were cited.]

But, secondly, the quarter sessions have heard this appeal, and decided it by holding that the grounds of appeal were insufficiently stated: *Reg. v. Broseley* (e), *Reg. v. Cheshire* (f). The sessions are the proper judges of the sufficiency of the information according to the varying circumstances under which they are given. "I think," said

(a) 10 A. & E. 682; S.C. 3 P. & D. 42.

(b) 10 A. & E. 685; S.C. 3 P. & D. 462.

(c) 10 A. & E. 688; S.C. 3 P. & D. 473.

(d) 10 A. & E. 693; S.C. ante, 265.

(e) 7 A. & E. 423; S. C. 2 N. & P. 355.

(f) 8 A. & E. 399; S.C. 1 P. & D. 88.



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*Coleridge J. in Reg. v. Bridgewater (a)*, "that in many cases the sessions would do well to constitute themselves judges of the requisite particularity, and if they thought that in the instance before them information enough had been given, decide the point accordingly."

Sir *F. Pollock A. G.*, *contra*, was stopped by the Court.

**WILLIAMS J.**—The third ground of appeal states that the appellants proposed to prove relief given by the respondents out of their parish. The argument against the sufficiency of it goes to exclude evidence of the most cogent description, that the pauper was settled in the respondent parish. This statement satisfies the object of the act of parliament, which was that parties at the trial of the appeal should not be taken by surprise. The second ground is no doubt too general; but the third, I think, gives adequate information; and the sessions having declined to hear the case altogether, I am of opinion that this rule should be made absolute.

**COLERIDGE J.**—There may be judicial observations somewhat conflicting upon the question whether the sessions may take upon themselves to determine finally the sufficiency of the statement of the grounds of appeal; but the authorities, on a review of them, appear conclusive that when the sessions have declined to hear a case on a preliminary objection, shutting out the merits of the case, their decision may be reviewed by this Court. If the sessions go into the case, then their decision upon the facts is without appeal. *Ex parte Broseley (b)* was a case of the latter description: to the sufficiency of the examination there was in that case no objection. A witness was called by the respondents, who proved the fact, varying in part from that set out in the examination. The sessions said, "You have failed

(a) 10 A. & E. 693; *S. C. ante*,  
 265.

(b) 7 A. & E. 423; *S. C. 2 N. &*  
*P.* 355.

in proving the case you proposed to prove." They clearly therefore went into the case, and decided it upon its merits. I still think that the question, whether the notice given is sufficient, must depend on many circumstances, of which the sessions must be better judges than we are. But I feel myself bound by the authorities, that this Court will inquire into the propriety of the decision of the sessions.

On the other point I agree with my brother *Williams*. The statement appears in perfect good faith to state a matter more within the knowledge of the respondents than of the appellants. It in effect says, "I object to the removal of the pauper because your parish has always acted as if he were settled within it." It gives adequate information of the strong *prima facie* case which the appellants propose to prove—that the respondent parish has relieved the pauper repeatedly out of their parish. The times, sums and places are all more within the knowledge of the respondents than of the appellants. I think there is nothing in the objection that the statement does not in terms assert a particular settlement. Proof of those facts stated would constitute a *prima facie* case without evidence of any particular settlement (*a*).

WIGHTMAN J.—It is clearly settled that if the sessions on a preliminary point come to an erroneous decision, shutting out the merits, this Court will always interfere. The second ground of appeal, stating that the pauper is settled in the respondent parish, is too general; but the third, the legal effect of which is the same as the second, is not open to that objection. It gives the particulars of facts, much better known to the respondents than to the appellants, which, if proved, would establish a *prima facie* case against the respondent parish (*b*).

G.

Rule absolute.

(a) See *Rex v. Edwinstowe*, 8 B. & C. 671; *Rex v. Yarwell*, 4 M. & R. 685; S. C. 9 B. & C. 894. (b) Lord Denman C.J. was absent.

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Monday,  
June 7th.

Ex parte STANFORD.

The Court has no power to issue a mandamus to the registrar of births, &c. under 6 & 7 Will. 4, c. 86, commanding him to erase the entry of a birth, on its appearing that the child was supposititious, and that the entry has been made for fraudulent purposes.

*THESIGER* applied (a) for a rule to shew cause why a mandamus should not issue to the superintendent registrar of births for the district of Brixton, Surrey, under 6 & 7 Will. 4, c. 86, commanding him to erase from the register the entry of the birth of a child as the son of *R.* and *A. Stanford*.

The affidavits in support of the rule stated a variety of circumstances, leading to the conclusion that *A. Stanford*, the widow of *R. Stanford*, who died in October, 1840, had feigned child-birth in January last, and procured a supposititious child to be entered in the registry of births as the child of herself and deceased husband, for the purpose of obtaining an annuity, to which she would have been entitled, in the event of her husband leaving issue.

*Thesiger* stated that the object of the application was to get rid of the evidence which the register might hereafter furnish that *R. Stanford* had left issue; that the provision for amending accidental errors under sect. 44 of the above act did not apply; that, if it did, the time for amending under it had gone by. [Lord *Denman* C. J. This application calls upon us to undo what a public officer has properly done under a statute, on materials brought before him, but we will consider.]

*Cur. adv. vult.*

LORD DENMAN C. J., on a subsequent day in this term (June 11), said the Court were desirous of interfering in such a case to prevent fraud, but thought they had no power to do so.

*D.*

Rule refused.

(a) Before Lord *Denman* C. J., *Patteson*, *Williams* and *Coleridge* Js.

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*Saturday,  
June 5th.*

**The QUEEN v. ALDERSON.**

**INFORMATION** in the nature of a quo warranto, for usurping the office of alderman of the borough of Carnarvon.

The plea set forth (inter alia) the following facts:

The prescribed number of aldermen for the borough is six and of councillors eighteen.

On the 26th December, 1835 (being the day appointed by the 5 & 6 Will. 4, c. 76, for the first election of councillors), eighteen councillors were elected.

On the 31st December, 1835, *William Lloyd Roberts* and *Robert Griffith* were elected aldermen by the councillors. There were twelve candidates, but the above-mentioned only had a majority, and no others were elected. Sixteen councillors took part in the election. *Roberts* and *Griffith* had nine votes each, eight of the other candidates had eight votes each, and the two remaining candidates had each seven votes.

On the 1st January, 1836, the said two aldermen and nine councillors elected a mayor. (There were annual elections of a mayor and councillors, on these no question was raised.)

On the 9th November, 1836, the council elected four additional aldermen and a mayor. These aldermen and the mayor declined to take office: a fresh election took place on the 24th July, 1837, when the same persons were again elected and accepted office.

On the 29th October, 1838, and not before, the council appointed who should be the aldermen to go out of office on the 9th November, 1838, naming three, the said *W. L. Roberts*, the said *R. Griffith*, and *W. Griffith*, one of the four who had been elected in July, 1837.

On the 9th November, 1838, the council (the mayor and one alderman being present) elected the defendant, in lieu of one of the three aldermen appointed to go out of office (a).

(a) The plea did not state that the three aldermen actually did quit office, but merely that they were appointed to go out.

Where the councillors of a borough did not, immediately after the first election of aldermen, appoint who should go out of office in the year 1838, as required by 5 & 6 Will. 4, c. 76, s. 25, but delayed such appointment until the 29th October, 1838:—*Held*, that such delay vitiated the election of the aldermen chosen to succeed the aldermen so appointed to go out of office.

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This plea was demurred to on several grounds, amongst which were the following, upon which the arguments and decision turned:—That at the time of the defendant's supposed election there was no vacancy in the office of alderman, inasmuch as the *councillors* did not immediately after the first election of aldermen, under the statute 5 & 6 *Will.* 4, c. 76, nor at or immediately after the election of aldermen in the year 1837 (*a*), appoint who should be the aldermen who should go out of office in the year 1838, and the meeting of the *council* stated to have been held on the 29th October, 1838, had no power to make such appointment. That, if there were any such vacancy, yet the defendant was improperly elected, for that a vacancy or vacancies could only exist by reason of the invalidity of the election of aldermen in the year 1837, in consequence of the omission of the council to declare immediately after the election who should be the aldermen who should go out of office in the year 1838, and that at all events the election of the two aldermen who were chosen at the first election of aldermen, and in lieu of one of whom, together with *Griffith*, the defendant is supposed to have been elected, was not avoided, but they remained in office.

*Jervis*, in support of the demurrer. The question is whether the corporation had any right to declare the vacancies two years after the power given by the act. By the 25th section of the 5 & 6 *Will.* 4, c. 76, “the *councillors*, immediately after the first election of aldermen, shall appoint who shall be the aldermen who shall go out of office in the year 1838, and thereafter those who shall go out of office shall always be those who have been aldermen for the longest time without re-election.” Here the *councillors* assembled upon the first election to elect aldermen, but they did not declare, as required by the act, which of the aldermen should go out of office: there were no vacancies therefore to be supplied. The meeting in October, 1838, was ineffectual for that purpose, and, indeed, if not too late in point of

(*a*) See 1 *Vict.* c. 78, s. 10.

time, it was in itself ill constituted, for that was a resolution of the *council*, and the act requires the *councillors* to appoint who shall go out of office. That alone would shew that the declaration must be made before the constitution of the corporation as a council. The 1 *Vict.* c. 78, s. 10, does not meet the objection.

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Sir *W. W. Follett* contra. If the argument on the other side prevail, the original aldermen will hold their offices for life, which would be contrary to the expressed intention of the legislature. It may have been irregular to declare at so late a period who should go out, but that irregularity will not render the declaration void, nor vitiate the subsequent election; the time will be deemed to be directory only. In *Rex v. Mayor of Norwich* (a), default had been made in the election of guardians by the specific day prescribed in the act, but this Court held the clause fixing the time of election to be directory only, and granted a mandamus to compel the corporation to proceed to an election. [Lord *Denman* C. J. The default of a party shall not absolve him, but here the parties are not the same, nor those invested with the power.] The councillors to nominate those who shall go out need not be the identical councillors who first elected them. [*Patteson* J. The word is "*councillors*" in the 25th section. It appears from this that the aldermen were to take no part, yet, in this case, the mayor and one of the aldermen did take part.] That is not a point of which notice has been given. [*Jervis*. It was stated when the rule was moved, and the rule of Court does not apply in cases of quo warranto, and, indeed, if it did, the Court does not require such particularity. If some grounds are stated, which are not frivolous, that is sufficient, and parties are not precluded from going farther. Lord *Denman* C. J. It is better that the real grounds should appear. We had now better consider the other points at all events.] However irregular the nomination of the aldermen to go

(a) 1 B. & Ad. 310.

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out of office may have been, still the provision of section 25, that one-half "shall go out of office" in 1838, and in every third succeeding year, is imperative. The vacancies in question existed therefore, and the defendant's election was good.

Lord DENMAN C. J.—I think this is too clear. The omission to declare in proper time which of the aldermen were to go out of office in 1838 seems to be an irremediable defect. To my mind the meaning of the 25th section is clear—that the same persons who elected the aldermen should have prescribed the term of their duration in office, and consequently should have declared at the first election which of them were to go out of office.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

D.

Judgment for the crown.

Tuesday,  
 June 8th.

DAVIS v. BLACK, Clerk.

A declaration in case against a clergyman marriage. **CASE** against a clergyman for refusing to solemnise a

for not solemnising a marriage, stated that the *plaintiff and Mary*, at the time of the grievance, &c. *were desirous* to intermarry; that a licence was obtained, authorising (in the usual form) the solemnisation of the marriage, at any time within three months from the date, between 8 and 12 A.M., and reciting that *Mary* had resided at B. for fifteen days next before the date; that defendant was minister of the church of B.; that by reason of the premises, and by force of the licence, it became the duty of the defendant to solemnise the marriage in the manner and time specified in the licence, when thereunto requested; that the defendant had notice of the licence, and was *requested by the plaintiff* to solemnize the marriage in the manner and time specified in the said licence, yet the defendant *wrongfully* and illegally refused.

*Held*, after verdict for the plaintiff, that the declaration was bad, as the request by the plaintiff alone did not shew notice to the defendant that *Mary* was willing to be then married.

*Semble*, per *Patteson and Coleridge Js.*, the declaration was also bad for not alleging the request to have been made within three months from the date of the licence.

*Semble*, per *Williams J.*, that the duty to solemnise the marriage, in the manner and time specified in the licence, was not well laid, as the defendant would be entitled to previous notice.

*Quere*, whether such an action is maintainable at all?

The declaration stated that before and *at the time* of the grievance hereinafter mentioned, the plaintiff, and one *Mary Ann Hogg*, then living, each of them then being sole and unmarried, and of lawful age, were minded and *desirous* to intermarry, and thereupon, to wit, on the 3d day of April, A. D. 1839, a certain licence and faculty, bearing date the day and year aforesaid, under the seal of *Edward Thomas March Phillips*, Clerk, M. A., Vicar General in Spirituals of the Right Reverend Father in God *James Henry*, by divine permission, Lord Bishop of Gloucester and Bristol, was duly granted by *Edwin Maddy*, then and there having due power and authority to grant the same, to the end that such marriage might be publicly and lawfully solemnised in the parish church of Blaisdon, in the county aforesaid, and in the diocese of Gloucester and Bristol aforesaid, by the rector, vicar or curate thereof, without the publication or proclamation of the banns of matrimony, and at any time *within three months* from the date thereof (the usual place of abode of the said *Mary Ann Hogg* having been within the said parish of Blaisdon, for the space of fifteen days immediately before the granting of such licence), providing there should appear no impediment in the case by reason of any former marriage, consanguinity, affinity, or other cause whatsoever, nor any suit, controversy or complaint be moved, or there depending before any judge ecclesiastical or civil, for or by reason thereof; and likewise that the celebration of such marriage should be had and done publicly in the aforesaid parish church of Blaisdon, between the hours of 8 and 12 A. M., which said licence and faculty was so granted as well to the plaintiff and *Mary Ann Hogg* as to the rector, vicar or curate of the aforesaid church, and who was designed to solemnise the said marriage in the manner and terms above mentioned. That at the time of the granting of the said licence and faculty, and from thence hitherto, the defendant was and now is the rector of the said parish of Blaisdon, and sole minister of the parish church thereof. That at the time of the granting of such licence

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and faculty there was not, nor was there at any time after, any impediment in the case by reason of any former marriage, consanguinity, affinity, or any other cause whatsoever, nor any suit, controversy or complaint, moved or there depending before any judge ecclesiastical or civil, for or by reason thereof. That by reason of the premises, and by force of the said licence and faculty, it became and was the duty of the said defendant, as such rector and minister as aforesaid, upon notice of the said licence and faculty, to solemnise the said marriage between the said plaintiff and the said *Mary Ann Hogg*, in the said parish church of Blaisdon, in the manner and time specified in the said licence and faculty, when thereunto requested. That the defendant heretofore, to wit, on the 7th day of April, in the year aforesaid, had due notice of the said licence and faculty, and that afterwards, to wit, on the day and year last aforesaid, and on several other days and times, between that day and the day of the death of the said *Mary Ann Hogg*, as hereinafter mentioned, he the defendant was *requested by the plaintiff* to solemnise the said marriage, in the manner and time specified in the said licence, yet the defendant disregarding his duty in that behalf, but contriving &c. wrongfully and illegally refused so to do. That afterwards, and whilst the defendant continued so to refuse to solemnise the said marriage, and before the said marriage was solemnised, to wit, on the 20th day of May, in the year aforesaid, the said *M. A. Hogg* departed this life, and the plaintiff, by reason of the said refusal and breach of the duty of the defendant, not only lost the benefit of the said licence and faculty, and the comforts and advantages of the said intended marriage, but hath been put to many costs, charges and expenses, in and about endeavouring otherwise to procure a solemnisation of the said marriage, and also to other costs, charges and expenses, and the costs, charges and expenses incident to the said licence have been thereby rendered useless and of no avail; and the plaintiff hath been further injured and prejudiced in his good name and credit amongst his neighbours

and other subjects of this realm, and also by means of the premises hath suffered much anxiety and distress of mind, and hath been and is otherwise greatly injured and damnified, to the plaintiff's damage, &c.

Plea: not guilty, and issue thereon.

A verdict having been found for the plaintiff, at the Gloucester spring assizes, 1840, a rule nisi was obtained, in Easter term following, to arrest the judgment.

*Ludlow* Serjt. and *Busby* shewed cause. An action lies against a clergyman for wrongfully refusing to solemnise a marriage. This declaration states that the defendant "wrongfully" refused, and that is sufficient, although there is no charge that the refusal was malicious and without probable cause. "In all cases where a man has a temporal loss, or damage by the wrong of another, he may have an action on the case to be repaired in damages:" *Com. Dig. Action upon the Case*, (A). "So it lies against an officer, for a neglect of the duty of his office:" *Com. Dig. Action upon the Case for Negligence*, (A 2). "Every breach of a public duty, working wrong and loss to another, is an injury and actionable:" *Sutton v. Johnstone* (a). It may be said, that the breach of the defendant's duty was of civil cognisance only. "In many cases, the common law and ecclesiastical courts have a concurrent jurisdiction:" 2 *Burn's Ecc. Law*, 49. But marriage is a civil contract, *Dalrymple v. Dalrymple* (b), and it is a valuable contract: *Cadogan v. Kennett* (c), *Campion v. Cotton* (d), *Winsmore v. Greenbank* (e). It is reasonable, therefore, that an action should lie for preventing the completion of such a contract. In *Williams's* case (f) it was held that an action would not lie at the suit of a lord of a manor against a parson for neglect of his duty to celebrate divine service for the lord of the manor and his tenants, and that the remedy was in the spiritual

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(a) 1 T. R. 509.

(b) 2 Hag. Con. Rep. 63.

(c) Cowp. 432.

(d) 17 Ves. 263 a.

(e) Willes, 577.

(f) Rep. 72 b.

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court. But that decision rests on the ground that the parson would be liable to infinite actions for one default, a reason which does not apply here, and it is there laid down that, "if the chapel had been private, only for himself and his servants and his family, within the said manor, then a private action on the case in the prescription, would be maintainable by the lord of the manor, &c. for in such a case he himself only (and none of his family) should have the action." In 2 Inst. 622, it is said, if a man be excommunicated and offer to perform sentence, if the bishop refuse to assail him, the party grieved may have his action on the case against the bishop. In *Clovell v. Cardinall* (a), which was an action against a parson for refusing to administer the sacrament, judgment for the plaintiff was arrested on the special ground that the declaration alleged two refusals by the defendant on two Sundays, and only one request, and that entire damages had been given, which was clearly bad; and in *Henley v. Dr. Burstow* (b), it was stated that an action would lie in such a case. *Barry v. Arnaud* (c) shews generally that a public officer is liable to an action for a non feissance. The licence is an authority to marry in the particular parish where one of the parties has been resident, it cannot therefore be said that the duty of solemnising the marriage did not lie on the defendant rather than on any other person generally competent to solemnise such a ceremony. The damage in this case is obvious, both in respect of the expenses uselessly incurred by the plaintiff, and of the loss of comfort, &c. [Lord Denman C. J. The declaration does not negative probable excuse.] Any excuse should come from the defendant; the refusal is stated to be wrongful, and that is enough after verdict, at all events. It is no objection to the declaration that it does not specially allege a request within three months from the date of the licence, and between the hours of 8 and 12 A.M.: a request is alleged to solemnise the marriage "in the manner and

(a) 1 Sid. 34.

(b) 1 Keb. 947.

(c) 10 A. &amp; E. 646; S. C. 2 P. &amp; D. 633.

time specified in the said licence." The objection that the plaintiff did not attend with his witnesses, is also matter of defence, and the 4 *Geo. 4*, c. 76, s. 28, as to this matter, is directory only. These and other similar objections are cured by the verdict, for the declaration has alleged the duty of the defendant and his wrongful refusal.

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*Tulfourd*, Serjt., Sir *W. W. Follett*, and *Taprell*, contra. No action lies unless the defendant has from an improper motive committed a breach of a duty, which he was bound to perform absolutely, either at common law or by statute.

The defendant was clearly under no common law duty. At common law no ecclesiastical ceremony whatever was necessary to marriage; *Jesson v. Collins (a)*, *Dalrymple v. Dalrymple (b)*, *Rex v. The Inhabitants of Brampton (c)*; though *Haydon v. Gould (d)* seems to be an authority for the contrary.

But, even assuming that it was by statute the duty of the defendant to perform the ceremony, his default was matter of ecclesiastical cognizance only, for he was not a common law officer but an ecclesiastical officer for the performance of religious duties. The burial of the dead is a matter of ecclesiastical cognizance only, *Rex v. Coleridge (e)*; and it is only where the neglect of the parson to bury creates a nuisance that the common law Courts can interfere, and then by criminal proceeding only; *Rex v. Taylor (f)*. So an action will not lie for disturbing another in the possession of a pew, unless the pew be annexed to a house in the parish, but the wrong is matter of ecclesiastical censure; *Mainwaring v. Giles (g)*.

At all events the defendant is not liable unless he acted maliciously, and the declaration should have alleged malice;

(a) 2 Salk. 437; S. C. 6 Mod. 155.

(b) 2 Hag. Con. Rep. 54.

(c) 10 East, 288.

(d) 1 Salk. 119.

(e) 2 B. & Ald. 806.

(f) Willes, 538, n.

(g) 5 B. & Ald. 356.

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*Cullen v. Morris* (a), *Ashby v. White* (b), *Williams v. Lewis* (c), *Harman v. Tappenden* (d), *Drewe v. Coulton* (e), *Ackerley v. Parkinson* (f), *Saxon v. Castle* (g). It is consistent with this declaration that, though the defendant refused "wrongfully," he did so from mistake or a conscientious scruple.

The declaration is open to many other objections. The declaration "ought to shew plainly and certainly all circumstances material for the maintenance of the action; for, if there are two intendments, it shall be taken most strongly against the plaintiff:" *Com. Dig. Pleader*, (C. 22). "So the plaintiff in his declaration ought to aver every fact, without being informed of which the Court cannot judge whether the plaintiff has cause of action:" *ib.* (C. 76). This declaration does not allege the various circumstances which would make the marriage legal within the statute and the defendant's refusal illegal.

The declaration alleges that it was the duty of the defendant to solemnise the marriage in the manner and time specified in the licence "when thereunto requested." But he was under no such duty on request, without reasonable notice.

The request may have been made after the three months had expired. It is alleged that the defendant was requested to solemnise the marriage "in the manner and time specified in the licence;" but the time there spoken of is the hour of the day, viz. between eight and twelve A. M. Again the request is by the plaintiff alone. But both the plaintiff and *M. A. Hogg* should have requested, or the defendant could not have solemnised the marriage.

It is not stated that both were willing to be married. [*Patteson J.* The declaration commences by stating that at the time of the grievance they were desirous to intermarry.]

(a) 2 Stark. N. P. C. 577.  
 (b) 2 Ld. Raym. 938.  
 (c) 2 Peake N. P. C. 157.  
 (d) 1 East, 555.

(e) 1 East, 563, n.  
 (f) 3 Mau. & S. 411.  
 (g) 6 A. & E. 652; S. C. 1 N. & P. 661.

But it is not stated that the defendant had notice of this: or that either of the parties had resided fifteen days in the parish; the statement of the residence is merely in the recital of the licence: or that the plaintiff attended with two witnesses: or that the parties tendered themselves to be married, or that the tender was dispensed with; *Sabourin v. Marshall* (a), *Bordenave v. Gregory* (b): or that the licence was delivered to the defendant, which is as necessary to state as that a writ, in respect of which the sheriff is charged, has been delivered to him: or that the refusal was *contra formam statuti*; *Com. Dig. Pleader*, (2 S. 10). The declaration would have been sustained by defendant's proving the licence, that defendant was clergyman of the parish, that plaintiff alone requested him to solemnise the marriage and that he refused. As the declaration might have been sustained without proof of any of the omitted facts, it is not cured by verdict; 1 *Wms. Saund.* 227, n. (b), *Jackson v. Pesked* (c), *Sweetapple v. Jesse* (d), *Hitchin v. Stevens* (e), referred to by *Patteson J.* in the case last cited, *Spieres v. Parker* (f), *Everard v. Paterson* (g). [*Ludlow Serjt.* "The statement of the duty in the declaration is an inference of law from the facts, and need not be stated at all, or, if improperly stated, may be altogether rejected;" *Lancaster Canal Company v. Parnaby* (h).]

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**LORD DENMAN.**—I am not prepared to say that an action might not lie against a public officer, who by neglecting his duty causes damage to another, especially if malice were alleged. Probably, however, no such action would lie where the officer is not bound to do the act required at any particular time, unless malice were alleged. But we have not to pronounce upon the general question, for this declaration is essentially defective. Hardly one of the

(a) 3 B. &amp; Ad. 404.

(e) 2 Show. 233.

(b) 5 East, 107.

(f) 1 T. R. 141.

(c) 1 Mau. &amp; S. 234.

(g) 6 Taunt. 645.

(d) 5 B. &amp; Ad. 27; S. C. 2 N.

(h) 3 P. &amp; D. 171.

&amp; M. 36.

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objections has been got over, but one of them is fatal. At the time of the request by the plaintiff and of the alleged wrongful refusal by the defendant to solemnise the marriage between the plaintiff and *M. A. Hogg*, it does not appear that the *defendant* had notice that *she* was willing to be married. It is clear that the whole of this declaration may have been proved, and yet, on the other hand, that she was proved to be unwilling. We should go beyond the cases as to the efficacy of a verdict in curing defective allegations if we held this declaration cured; the verdict cannot be taken to establish more than is necessarily involved in the proof of the facts alleged.

PATTESON J.—We need not determine whether the action would lie. But I confess there appears to me a great difference between such a question at common law and since the marriage act; because formerly the ceremony might have been performed any where, so that the duty could not well have been fixed on any particular clergyman. But since the marriage act it would seem that there is a duty on the clergyman of a particular place, for any stranger might be kept out and prevented from performing the ceremony. But I am of opinion that this declaration is bad. The duty alleged is to solemnise the marriage “in the manner and time specified in the licence when thereunto requested.” Even if the allegation that the defendant “was requested to solemnise the said marriage in the manner and time specified in the said licence” is to be taken to mean that he was requested within the three months, still by whom was he to be requested? By both the parties to be married. One of them might wish one time and the other a different time. The declaration alleges the request by the plaintiff alone. It should have alleged the request by *M. A. Hogg* also. The request of the woman is not included in the request of the man, and therefore the finding by the jury that he requested does not include a finding that she requested also. The defect of the de-

claration in this respect is not cured by verdict, within the doctrine of *Jackson v. Pesked* (a), for her request was not a fact which the judge could have had to leave to the jury, or without finding which he would not have suffered the verdict to pass for the plaintiff. I also think the declaration bad, because the request is not alleged to have been during the three months while the licence was in force.

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WILLIAMS J.—I am of the same opinion. I was also struck with another objection, that the duty to solemnise the marriage is alleged to have accrued from the licence when the defendant should be thereunto requested. I much doubt whether that was the defendant's duty; he surely could not be bound to forego all other duties immediately on request and inspection of the licence.

COLERIDGE J.—It is not necessary to express an opinion on the general question, but I should be sorry if our silence should encourage the notion that such an action would lie. When the duty of a clergyman is considered, his position will appear very different from that of a registrar for the solemnisation of marriages, under 6 & 7 Will. 4, c. 85; and I have great doubt on the liability of the former for the breach of duty which is made the foundation of this action. But this declaration is bad. The duty must grow from the circumstances stated, and the duty charged would not arise unless it appeared that both parties to the marriage were willing. Again, the request does not appear to have been made within the statutable time of three months from the date of the licence.

Rule absolute.

D.

(a) 1 Mau. & S. 234.





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The QUEEN v. HOLDSWORTH, Esq. and another (a).

On the application of the overseers of a parish, two justices made an order on them to remove a pauper lunatic to the County Asylum, under the stat. 9 Geo. 4, c. 40, s. 38. The order, pursuant to the 41st section of the act, stated that the legal settlement of the pauper was unknown, and directed the expense to be charged to the county. The overseers obeyed the order, and did not appeal against it. Under the 42d section, two justices afterwards inquired into the place of the last legal settlement of the pauper, and adjudged it to be in the parish the overseers of which had applied for the first order:—

Held, that on the trial of an appeal against such adjudication, that their acts of application for and obedience to the first order, precluded them from saying that the pauper was not chargeable to their parish at the time when they made their application for it.

ON an appeal against an order of two justices for the removal of a pauper lunatic, the Court of Quarter Sessions for the West Riding of Yorkshire quashed the order, subject to the opinion of the Court on the following case:—

This was an appeal against the following order of *Joseph Holdsworth* and *Francis Maude*, Esqrs. two magistrates of the West Riding of Yorkshire, dated the 6th December, 1838, and made under sect. 42 of 9 Geo. 4, c. 40, entitled “An Act to amend the Laws for the Erection and Regulation of County Lunatic Asylums, and more effectually to provide for the Care and Maintenance of Pauper and Criminal Lunatics in England.”

“West Riding of Yorkshire, } Whereas on 16th September, A.D. 1837, *Mary Frances Heaton*, spinster, a poor person chargeable to the township of Doncaster, in the West Riding of the County of York, was deemed to be insane, and whereas the overseers of the said township of Doncaster did bring the said *Mary Frances Heaton* before *Edmund Denison* and *William Battie Wrightson*, Esqrs. two of her majesty’s justices of the peace in and for the said West Riding, and the said *Edmund Denison* and *William Battie Wrightson*, so being such justices as aforesaid, did thereupon then and there call to their assistance *Edward Scholefield*, Esq. Doctor of Medicine, and upon due examination of the said *Mary Frances Heaton*, the said *Edmund Denison* and *William Battie Wrightson*, so being such justices as aforesaid, were then and there satisfied that the said *Mary Frances Heaton* was insane, but the place of the legal settlement of the said *Mary Frances Heaton* could not be there and then ascertained: And whereas the said *Edmund Denison* and *William Battie Wrightson*, so being such

(a) Decided in Hil. T. last (January 23).

justices as aforesaid, by an order under their hands and seals bearing date the said 16th September, A.D. 1837, directed to the overseers of the poor of the said township of Doncaster, did direct the said overseers to cause the said *Mary Frances Heaton* to be conveyed to the Riding Lunatic Asylum established in the township of Stanley-cum-Wrenthorpe, in the parish of Wakefield, in the said riding, the said Pauper Lunatic Asylum being a house duly licensed for the reception of insane persons; and the treasurer of the said West Riding was thereby ordered to pay to the treasurer of the said Asylum such weekly sum for the maintenance and care of the said *Mary Frances Heaton*, according to the 9 Geo. 4, c. 40, as should from time to time be fixed upon by the visiting justices of the said Asylum: And whereas the said *Mary Frances Heaton* was under and by virtue of the said last mentioned order conveyed by the overseers of the poor of the said township of Doncaster to and placed in the said Pauper Lunatic Asylum, established at the township of Stanley-cum-Wrenthorpe aforesaid, on the said 16th September, A.D. 1837, and from thenceforth has been and now is confined therein under the said last mentioned order; and a certificate from the said *Edward Scholefield*, bearing date 16th September, 1837, that he had personally examined the said *Mary Frances Heaton*, and that she appeared to be of insane mind, was duly delivered by the overseers of the said township of Doncaster to *Charles Cæsar Corsellis*, the superintendent of the said Pauper Lunatic Asylum, at the time the said *Mary Francis Heaton* was placed therein: And whereas we, *Joseph Holdsworth* and *Francis Maude*, Esqrs. two of her majesty's justices of the peace acting in and for the said West Riding, did upon the 5th December, instant, duly inquire into the last legal settlement of the said *Mary Frances Heaton*, and satisfactory evidence was obtained as to such settlement: And whereas the visiting justices of the said Pauper Lunatic Asylum did, on the 8th January, 1838, fix upon the weekly sum of six shillings for the maintenance, clothing, medicine, and care of the said

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*Mary Frances Heaton*, and the same has been paid by the treasurer of the said West Riding: We, the said *Joseph Holdsworth* and *Francis Maude*, Esqrs. so being such justices as aforesaid, do therefore, upon due proof made before us upon oath, and upon due consideration had of the premises, adjudge that the last legal settlement of the said *Mary Frances Heaton* is in the township, parish or place of Doncaster aforesaid: And we do order and direct that the churchwardens and overseers of the poor of the township, parish and place of Doncaster aforesaid shall and do, upon notice of this our order, repay unto *Ellis Hodgson*, the treasurer of the said West Riding, the sum of 19*l.* 4*s.* for the maintenance, medicine, clothing and care of the said *Mary Frances Heaton*, in the said Pauper Lunatic Asylum, from 16th September, 1837, to the date hereof, at and after the said rate of six shillings for each and every week: And we do further order and direct that the churchwardens and overseers of the said township, parish or place of Doncaster aforesaid shall and do pay to *Charles Cæsar Corsellis*, the treasurer of the said Pauper Lunatic Asylum, from the date of this our order, the weekly sum of six shillings for the future maintenance, medicine, clothing and care of the said *Mary Frances Heaton* during her continuance in the said Pauper Lunatic Asylum, or until otherwise ordered according to law. Given under our hands and seals this 6th December, 1838.

*J. Holdsworth*, (L.S.)

*Fran. Maude*, (L.S.)"

It appeared on the trial of the appeal that a previous order, dated 16th September, 1837, under the hands and seals of *Edmund Denison* and *William Battie Wrightson*, Esqrs. two other magistrates of the West Riding, had been made pursuant to sects. 38 and 41 of the said act, and duly served upon the appellants, of which the following is a copy:—

"West Riding of Yorkshire.

"To the Overseers of the Poor of the Township of Doncaster, in the said Riding.

"Whereas it appears to us, *Edmund Denison* and *Wil-*

*liam Battie Wrightson*, two of her Majesty's justices of the peace acting in and for the said riding, having called to our assistance *Edward Scholefield*, Esq., M.D., a physician or surgeon, that *Mary Frances Heaton*, chargeable to the township of Doncaster, in the said riding, is a lunatic insane or a dangerous idiot, you are hereby directed to cause the said *Mary Frances Heaton* to be conveyed to the riding lunatic asylum, established in the township of Stanley-cum-Wrenthorpe, in the parish of Wakefield, in the said riding, the said pauper lunatic asylum being a house duly licensed for the reception of insane persons, and you are hereby ordered to pay to the treasurer of the said asylum such weekly sum for the maintenance and care of the said *Mary Frances Heaton* as shall from time to time be fixed upon by the visiting justices of the said asylum. Given under our hands and seals, this 16th day of September, A.D. 1837. *Edward Denison* (L.s.)

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*W. B. Wrightson* (L.s.)

"The expenses to be charged to the riding in consequence of Miss *Heaton's* settlement being unknown.

*E. Denison,*

*W. B. Wrightson."*

In pursuance of this order of the 16th of September, 1837, *Mary Frances Heaton* was removed by the appellants to the West Riding Lunatic Asylum at Wakefield, and against that order there was no appeal. In the notice of appeal against the present order of 6th December, 1838, the appellants stated as one of their grounds that *Mary Frances Heaton* was not on the 16th September, 1837, or at any other time a poor person chargeable to the township of Doncaster. At the trial, the appellants contended that the respondents were bound to shew a chargeability to Doncaster on or before the 16th September, 1837. On the other hand, it was contended by the respondents that in an appeal against the order of the 6th December, 1838, the question of chargeability at the time of making the original order of the 16th September, 1837, did not arise; but the order of the 16th September, 1837, (not having been ap-

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pealed against), was conclusive of a chargeability at that time. The sessions held that proof of chargeability on or before the 16th September, 1837, must be given by the respondents, though there had been no appeal against the order of that date. It was then proved that *Mary Frances Heaton* had, shortly before the 16th September, 1837, been committed to Doncaster gaol (which is situated in the township of Doncaster), for a breach of the peace, and while detained there for want of sureties was found to be insane, and, she having no visible means of support, the assistant-overseer of Doncaster applied to two magistrates (Messrs. *Denison* and *Wrightson*) for an order to commit her to the West Riding Lunatic Asylum under 9 Geo. 4, c. 40, s. 38, which was made accordingly, and is the order of 16th September, 1837, above set out.

The appellants contended that this was not a chargeability within the act, but that in order to give the justices, (who made the order of the 16th September, 1837), jurisdiction, there must have been an actual giving of relief. The sessions were of that opinion and discharged the order, subject to the opinion of the Court of Queen's Bench on both points, viz. :—

First, whether the appellants were entitled to call upon the respondents to give proof of an actual chargeability on or before the 16th September, 1837, though the order of that date had not been appealed against; and

Secondly, whether for the purpose of proving such chargeability an actual giving of relief must have been shewn.

If the opinion of the Court should be against the respondents on both points, the order of sessions is to be confirmed; if in favour of the respondents on either, the order of sessions is to be quashed, and the original order appealed against to be confirmed.

*Dundas* and *W. Walker* in support of the order of sessions. The case raises two questions for the determination of the Court :—

First, whether it was necessary on the trial of this appeal to shew that at the date of the first order the lunatic was chargeable to the parish of Doncaster.

Secondly, whether to constitute "chargeability" on a parish, within the meaning of the statute of 9 *Geo.* 4, c. 40, actual receipt of relief from the parish must not be proved.

The order by two magistrates of the 16th September was the foundation of the order appealed against, and the second order is void for want of jurisdiction in the magistrates who made it, unless the lunatic was removed to the asylum by an order of justices duly made under the provisions of the statute 9 *Geo.* 4, c. 40, ss. 38 and 41. The magistrates who made the order of the 16th September have no jurisdiction, unless the lunatic was then chargeable to the parish of Doncaster. But the being in the gaol of Doncaster without means of support was not a chargeability on the parish. This is a branch of the law of settlement in which it has been clearly settled, that to be "chargeable" a person must "become a burthen to the parish by the actual receipt of relief (a)." [*Patteson J.* The very persons, who brought the pauper before the justices who made the first order, are those who now object that they had no jurisdiction to do so, because the pauper was not chargeable.] She might not have been settled in Doncaster but merely casually chargeable. [*Coleridge J.* But even then she would be a lunatic, chargeable to the parish of Doncaster.] The first order cannot conclude the parish of Doncaster, they had no means of objecting to it, they could not have appealed, the right of appeal is given by the 46th section of the act to the party aggrieved, but they were not aggrieved by the order which directed the expenses to be borne by the whole riding: *Rex v. George (b)*. A retrospective order for expenses then incurred would not be binding: *Rex v. Inhabitants of St. Nicholas, Leicester (c)*.

(a) *Nol. P. L.* 195; *Burr. S. C.* 748; *Rex v. St. Mary, Westport*, 3 T. R. 44.

(b) 6 A. & E. 305; S. C. 1 N. & P. 451.

(c) 3 A. & E. 79; S. C. 4 N. & M. 624.

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Again, that order does not state that it was made on the application of the parish officer of Doncaster, nor is that fact stated in the case. The case does state that the order was made on the application of the assistant-overseer, but he is a person whose office and duties are unknown to the law: *Rex v. The Justices of the North Riding of Yorkshire (a)*. He may have acted without any authority from the parish officers; then, if there is no estoppel, it appears upon the case that the pauper was not in the legal sense of the word chargeable on the parish. [*Coleridge J.* The parish officers of Doncaster acted on the order, and removed the pauper to the asylum.]

Lord DENMAN C. J. I think the case must be taken to state that the first order was founded on the complaint of the parish officers of Doncaster. Upon this application the justices inquire into the insanity of the pauper, and I am therefore of opinion that it is not competent to them now to say that the pauper was not chargeable to their parish. The argument, that the order might have been made on an application unauthorised by the parish officers, shews that the order which they obeyed was a grievance which entitled them to appeal.

LITLEDALE, PATTESON and COLERIDGE Js. concurred.

Order of Sessions quashed.

*Sir G. Lewin* and *Baines* appeared in support of the original order.

G.

(a) 6 A. & E. 863; S. C. 2 N. & P. 103.



BENSON and others v. BRUNT and others.

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*Thursday,  
June 10th.*

**ASSUMPSIT.** The plaintiffs declared on a charter-party of affreightment, dated 25th October, 1836, made between them as the owners of the ship called the William Miles, and the defendants as the freighters, for a voyage from the port of London to Clarence Cove, in the island of Fernando Po, for a cargo of teak timber, and return to London; the vessel to "be at Clarence Cove aforesaid for the purpose of receiving on board the said cargo, and in the port of London for the purpose of discharging the same, eighty-five running days on the whole, if required; such lay days to commence and be accounted from the day on which the ship should be ready to receive on board the cargo at Clarence Cove, and notice thereof given to the agents of the defendants; to cease on the cargo being laden and the ship despatched to the port of London; to recommence upon the arrival of the ship in the port of London and being ready to unload, and notice thereof given; and finally to cease on the cargo being discharged." And the plaintiffs further agreed that the defendants might keep the vessel on demurrage at the aforesaid ports and places of loading and delivery for the term or space of fourteen running days on the whole, over and above the aforesaid lay days, "on paying demurrage at and after the rate of 8*l.* 10*s.* sterling &c. per day, day by day, as the same

Plaintiffs, owners of a ship, agreed by charter-party that the ship should have eighty-five running days for loading and unloading her cargo, and that the freighter might keep her on demurrage for fourteen additional running days, at a stipulated rate per diem. The ship arrived in port with five running days due to her. On her arrival and subsequently, on another occasion, the plaintiffs refused to permit her to be unloaded. Afterwards, but not till after the expiration of the

running days, she was permitted to unload, but the cargo was not discharged until after the expiration of fourteen days beyond the running days. In assumpsit against the freighter on the charter-party, the declaration charged a detention on demurrage for fourteen days, and a general detention beyond.

Pleas, 1. Non-assumpsit; 2. that he did not keep or detain the ship modo et formâ; 3. that at the time she was unloading the plaintiffs wrongfully stopped the unloading, and prevented the defendants from unloading. The jury found that the plaintiffs' refusal was wrongful.

*Held*, on motion for a new trial and for judgment non obstante veredicto, on the third plea:—

1. That the plea denying the detention of the ship was sufficiently made out by the finding of the jury, and that the plaintiffs could not, under this declaration on the charter-party, recover for the use of the ship during so much of the actual unloading as exceeded five days.

2. But that the third plea was bad; as such an interference by the plaintiffs to prevent an unloading as was stated in the general terms of the allegations of that plea would not put an end to the obligation of the charter-party.



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should arise and become due." Averment, that the ship arrived at Clarence Cove on the 25th January, 1837, and was then ready to receive on board the cargo, and on the 22d April the cargo was laden on board and the ship despatched; and that the defendants in and about the loading of the vessel kept and detained her at Clarence Cove "for eighty running days;" that she arrived on the 26th June at London with the cargo, and was then ready to unload, whereof the defendants had notice, "and the plaintiffs continued ready and willing to unload the cargo as aforesaid until the same was discharged;" and the same was on the 27th July completely discharged and unloaded. "And the plaintiffs aver that the defendants kept the said vessel on demurrage at the said ports and places of loading and unloading for divers, to wit, fourteen days over and above the said eighty-five running or lay days in and about the loading and unloading of the said cargo," and thereby they became and were liable, according to the said charter party, to pay to the plaintiffs 119*l.*, being at and after the rate of 8*l.* 10*s.* for each and every of those fourteen days. Breach, the non-payment of the 119*l.*, or any part thereof; and that the defendants further disregarding, &c. wrongfully kept and detained the vessel in and about the unloading of the said cargo as aforesaid for eight days over and beyond the said fourteen days so allowed and agreed upon for demurrage, whereby the plaintiffs during all that time were deprived of the use of the vessel, and were also put to great costs, charges, and expences, &c. Damages 200*l.* Pleas: 1. Non-assumpserunt; 2. That defendants did not keep or detain the vessel in manner and form, &c.; 3. That at the time when the said vessel was unloading, as in the declaration mentioned, the plaintiffs wrongfully stopped the unloading thereof and prevented the defendants from unloading the same. Issues joined.

At the trial at the sittings in London after Hilary term, 1840, before Lord *Denman* C. J. it appeared that the vessel having, under the charter party, eighty-five lay or

running days from notice given, for loading and unloading a cargo, and fourteen additional running days on demurrage, occupied eighty of those days in taking in her cargo at Fernando Po. Her arrival in London was reported to the defendants on the 28th June; she had then five running days due to her. On her arrival, a dispute arose about the freight: the unloading of the cargo was stopped by the plaintiffs until after the running days had expired, and a subsequent interruption, on the part of the plaintiffs, of the unloading took place within the days of demurrage, viz. from the 10th July to the 19th, inclusive. The cargo was not discharged until the 27th. Only ten days, exclusive of Sundays and the interrupted days, were occupied in the *actual* unloading. On these facts his lordship directed the jury that the only question was, whether the plaintiffs were entitled to any number of days demurrage, but that, if they thought the delay in unloading was occasioned by the wrongful act of the plaintiffs, they might find for the defendants. The jury found accordingly for the defendants.

In the following term, Easter, a rule nisi for a new trial having been obtained on the ground of misdirection, and for a judgment on the third plea non obstante veredicto,

Platt and Kelly shewed cause in this term (*a*). The verdict is right on the second plea. The declaration charges as a breach of the charter party that the defendants "kept the vessel on demurrage for fourteen days over and above the eighty-five running days." The defendants deny the breach in the terms alleged. The plaintiffs by their own act, in stopping the unloading (which the jury found to be wrongful), deprived the defendants of the benefit of the running days, and have thereby deprived themselves of any legal claim for demurrage in this form of action, even although the defendants had afterwards been guilty of an

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(*a*) On a former day in this term (June 4), before Lord Den-
man C. J., *Patteson, Williams, and Coleridge, Js.*

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unreasonable delay in taking out the cargo. In the case supposed there might have been a question for the jury if the declaration had been special for not unloading after notice to proceed. Again, as to the motion to enter judgment on the third plea. On special demurrer, the plea might be held bad for generality, but it is good after verdict. [*Patteson J.* The ground of entering judgment for the plaintiffs non obstante veredicto is, that, assuming the allegations of the third plea to be true, you do not allege that you could have performed the contract by unloading within the running days due to the ship, if you had not been hindered by the plaintiffs.] That allegation is unnecessary; the plaintiffs seek to recover a penalty for delay in unloading, and the third plea alleges that the delay was occasioned by their own fault. Or the plea may be considered as an informal traverse of the allegation that the plaintiffs "continued ready and willing to unload."

Erle and *W. H. Watson* contra. It was not stipulated in the charter party that the running days should be consecutive days; if they were not, there was no breach of contract by the plaintiffs. But assuming, after the finding of the jury, that the plaintiffs had committed a breach, this would not dissolve the contract in fact, or give the defendants a right to put an end to it: *Fillicul v. Armstrong* (a). [*Patteson J.* The defendants say that the specific detention for which you claim damages was your own act.] Still they were liable on the contract; their remedy, if any, was by a cross action. The proper question for the jury was, whether the stoppage was unreasonable, and had deprived the defendants of the benefit of the charter party: *Freeman v. Taylor* (b). The third plea is manifestly bad. It confesses the detainer and does not avoid, for it omits to allege that the cargo would have been discharged within

(a) 7 A. & E. 557; S.C. 2 N. & P. 400.

(b) 8 Bingham 124; S.C. 1 M. & Scott, 182.

the running days if the plaintiffs had not hindered: *Fillicul v. Armstrong* (a).

Cur. adv. vult.

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Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action for demurrage on a charter party. The declaration charged a detention on demurrage for certain days, and also a general detainer beyond the days of demurrage. The third plea, which was special, was acknowledged by defendant to constitute no defence on account of its generality; but the second stated that the defendant did not detain the ship *modo et formâ*. The fact was, that the ship returned with five running days due to her, and that she did not complete her unloading until not only the fourteen days of demurrage beyond the running days were exhausted, but also some beyond.

The claim was for liquidated damages for the demurrage days, and general damages for the farther detention.

The plaintiff, on the ship's arrival, and subsequently on another occasion, refused to permit her to be unloaded.

The jury found that this refusal was wrongful. Afterwards defendant was permitted to unload, but not till after the expiration of the running days, in whatever sense those words can reasonably be understood. Under these circumstances, whether the plaintiffs are entitled to recover at all for the use of their ship during so much of the actual unloading as exceeded five days may be doubtful, and would have been for the jury on the facts under another form of declaration; but we hold it clear that they cannot recover for it under the terms of the charter party.

We do not intend to lay down that any interference, for however short a time, by the owners, to prevent an unloading within the running *days* and *days* of demurrage, will put an end to the obligation of the charter party, and therefore we hold the third plea to be bad; but it is clear that they cannot exercise an arbitrary power of selecting on what days the unloading shall take place, or of

(a) 7 A. & E. 557; S.C. 2 N. & P. 400.

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interrupting capriciously that operation which the freighter must certainly be understood to stipulate for the power of carrying on continuously, and by so doing the owners, and not the freighters, are the parties who detain the vessel.

We think in the present case the plea, that the defendant did not detain the ship, is sufficiently made out by the jury's finding that the cargo was improperly kept on board by the plaintiffs' own wrongful act, and are of opinion that the rule must be discharged.

Rule absolute for judgment for the plaintiff
 on the third plea non obstante.

Rule for a new trial discharged.



Tuesday,
June 8th.

CAUDLE v. SEYMOUR, Esq.

A warrant of apprehension was issued by a justice of peace, which did not recite any information on oath, and it appeared that, in point of fact, the information was not sworn in his presence:—
Held, that he was liable in trespass.

Qu. Whether a warrant is not totally void, which does not recite any information, and which directs an apprehension "to answer all such matters and things as in her Majesty's behalf shall be objected against him by A. B. for an assault committed on," &c.

TRESPASS for assault and false imprisonment. Plea—Not guilty (by statute.) At the trial before *Littledale J.*, at the Sussex summer assizes, 1840, it appeared that defendant, who was a magistrate, justified the trespass complained of under a warrant in the following form:

I do hereby, in her Majesty's name, command you and every of you, upon sight hereof, to apprehend and bring before me, one of her Majesty's justices of the peace on &c. the body of (the plaintiff), of whom you shall have notice, to answer to all such matters and things as on her Majesty's behalf shall be objected against him on oath by *Mary Ann Warner*, of &c., for an assault committed upon her upon the 24th instant.

The party alleged to be assaulted was a child. The defendant, with his clerk, went to the cottage in which the child lived, and the clerk went up stairs into the room in which she was and took her information, the defendant directs

ring that time remaining in a room below. The charge against the plaintiff was dismissed on hearing. The learned judge held the warrant to be no justification, and the plaintiff had a verdict. In the following term a rule was obtained to shew cause why a new trial should not be had; against which

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Peacock shewed cause. The warrant is no justification to the defendant. It is bad on the face of it for not shewing that any information was laid before him to authorise him to issue his warrant. That this is necessary is shewn by the precedents: *Burn's Justice* (a), and by the authority in 2 *Hale*, P. C. 111. The latter shews also that the facts proved in this case were not evidence of a complaint. The magistrate ought himself to take the information. (He was then stopped by the Court.)

Platt contra. This warrant was sufficient to give the magistrate jurisdiction; if not, it was sufficient, to prevent his being liable in trespass, that he had jurisdiction over the offence. All the cases that can be relied on by the other side are cases of commitments, which stand on a different ground. Trespass will not lie against a justice who has jurisdiction over an offence for issuing his warrant against a party in order to inquire into it. The warrant, to be good, must issue by one having lawful authority, and it must state the cause, but "not so certainly as an indictment ought" (b). *Butt v. Conant* (c) is a strong authority for the position that jurisdiction over the offence is sufficient. The warrant there set out is as general as in this case. [*Patterson J.* The statement of the warrant in the report of that case appears to me to be intended to give the substance only, and clearly not the whole language of it.] The warrant here sufficiently shews what the offence charged was; and the preliminary proceeding in taking the complaint

(a) Tit. Warrant of Apprehension.

(b) 2 Inst. 591.

(c) 1 B. & B. 548.

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authorised the defendant to issue it. As to the objection that he was not present, it was not necessary. The taking of an information may be assimilated to the swearing of an affidavit in this Court. It must be conceded that, if the warrant recited the taking of an information on oath, it would have been sufficient, and a mere irregularity in taking it cannot make the defendant liable to an action for putting it in force.

Lord DENMAN C. J.—It appears to me to be clear that this warrant is insufficient. There is no recital of an information, nor does it appear in fact that an information was taken by the defendant. The second point raised is one of great importance; it is said the magistrate has jurisdiction, and that is sufficient to protect him; but that must be understood not of a general jurisdiction over the subject-matter, but of jurisdiction over the particular case. In this case the witness's information was not taken in the justice's presence. The child was sworn, but not before him.

PATTESON J.—The words "for an assault" must be coupled with the words "before me," otherwise the warrant is a general warrant, and totally void. It is not enough that a warrant recites a particular fact; it ought to call upon the party to answer to that, and not to answer to all matters and things. The constant practice is to recite the information of the particular fact complained of, which the defendant is to answer, and, if the magistrate does not do that, he must take the consequence. As to the other part of the case, it is the duty of the magistrate to take care that the information is properly sworn. It is nothing like the case of an affidavit in the superior courts. It is a matter for the exercise of some discretion.

WILLIAMS J.—This is not like the case of an affidavit, which is to speak for itself, and the contents of which are to be available or not as the judgment of the Court shall subsequently determine. In taking an information, the dis-

cretion of the magistrate is to be exercised. In this case the clerk takes the information in the absence of the justice. That does not amount to evidence that the party was charged upon oath before a magistrate.

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COLERIDGE J.—The justice has jurisdiction in the abstract, but to have jurisdiction over the particular case he must shew the circumstances which bring it into operation. He has no right to apprehend any body he pleases because he is a justice. He must have an information of the circumstances alleged on oath. Then do the facts here justify him? I think not, and I am glad this question has been discussed, because I am afraid it is a frequent practice to take an information in the manner in which this was taken. The swearing an affidavit is a ministerial act; but, on an information, the question immediately arises whether a warrant shall be issued or not. If the information is not actually taken by the justice, how is he to determine afterwards, when the accused is apprehended, whether he shall take bail or not?

Rule discharged.

Lord DENMAN C. J. added:—Mr. *Robinson* mentions that not very long since a justice of the peace was convicted in this Court for issuing his warrant, where his clerk had taken the information.

G.

The QUEEN v. The BIRMINGHAM and GLOUCESTER  
RAILWAY COMPANY.

Thursday,  
May 27th.

THIS was a rule calling on the prosecutor to shew cause why an indictment found by the grand jury of the county of Worcester against the Birmingham and Gloucester Railway Company by their corporate name should not be returned, on the ground that such an indictment does not lie, was discharged, the Court expressing no opinion on the question, but leaving the defendants to take the objection on demurrer, with liberty to plead over in case of a decision against them.

A rule to quash an indictment for misdemeanor against a corporation aggregate in their corporate name, on the ground that such an indictment does not lie, was discharged, the Court expressing no opinion on the question, but leaving the defendants to take the objection on demurrer, with liberty to plead over in case of a decision against them.



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be quashed, on the ground that a corporation aggregate was not liable to an indictment in that form.

By 6 *Will.* 4, c. xiv. which incorporated the company, and empowered them to construct a railway, it was provided, that when the company should take any land for the purposes of the act, they should make such bridges, arches and roadways in order to connect portions of lands severed by the railway, as two justices, on the application of the owner of such lands in case of dispute, should appoint by their order. An order of two justices had been made on the company to erect an arch to connect the prosecutor's lands, and the order was confirmed by the quarter sessions. An indictment had been found against the company by their corporate name at the Worcestershire assizes for disobedience to this order, and removed into this Court by certiorari. The company had not appeared or pleaded.

*Talfourd*, Serjt. now shewed cause (a). It may be conceded that a corporation aggregate is not so indictable for a misfeasance or for an act done, because the individual members who took part in the act are alone responsible; *Thusfeild* and *Jones*, Masters and Wardens of the Company of Waxchandlers (b). There the defendants being cited into the spiritual court by their names of baptism and their surnames, with the addition of masters and wardens of the company of waxchandlers, moved for a prohibition, on the ground that they ought to be sued in their political capacity. But the Court said there was no other way of citing them than this, they could not cite the body politic: "they were cited by their proper names, but in their politick capacity; but, if they stood out, then they must lie by their heels in their natural capacity:" see also *Anonymous* (c), note per *Holt* J. But in case of non-feasance, or omission to perform a duty imposed, such an

(a) Before Lord Denman C. J.  
*Patteson*, *Williams* and *Coleridge*,  
J's.

(b) *Skin.* 37.  
(c) 12 *Mod.* 559.

indictment will lie against a corporation: *Rex v. The Mayor, Aldermen and Burgesses of Stratford-upon-Avon*(a); *Rex v. The Regent's Canal Company*(b); *Rex v. The Company of Proprietors of the Kennet and Avon Canal Navigation*(c), where a precedent was furnished by the crown office; *Rex v. The Dean and Chapter of Christchurch*(d). If it be said that an indictment is not a proper course of proceeding because a company of proprietors is not liable to punishment, that objection would apply with equal force to a proceeding by mandamus, disobedience to which is punishable by attachment, or to an indictment against the inhabitants of a parish: a fine may be imposed. But, at all events, the Court will not, on a doubtful question of law, quash the indictment, which would at once conclude the prosecutor, but will leave the defendants to demur or move in arrest of judgment, or bring a writ of error: *Rex v. Cooke*(e).

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*Whateley* contra. In *Rex v. The Company of Proprietors of the Kennet and Avon Canal Navigation*, and in all the precedents of indictments, individual parties, against whom process might issue after verdict, were joined as defendants. In this indictment some individual members of the company should have been pointed out by name. The defendants may wish to sever in their defences. [Lord Denman C. J. We do not wish to give any opinion on this matter on motion. You may demur.] The judgment of the Court on a demurrer to an indictment for a misdemeanour is final, if the demurrer is overruled.

SED PER CURIAM.—The defendants may demur, and, in case the demurrer is overruled, they may be at liberty to plead over.

Rule discharged.

(a) 14 East, 348.

(b) Cited in *Reg. v. London and Birmingham Railway Company*, 1 Railway Cases, 323.

(c) 3 Chit. Crim. Law, 600.

(d) Id. 603.

(e) 2 B. & C. 618, 871; S.C. 4 D. & R. 114.

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Saturday,  
June 12th.

## BICKNELL v. WETHERELL.

Plaintiff signed judgment in an action of debt, and took the defendant in execution by a ca. sa., which was in form for damages recovered on promises.

After the lapse of a year and day from the judgment, the defendant having applied to set aside the execution, the Court allowed the plaintiff to amend the writ without a scire facias.

*Quere*, whether a defendant in execution can make successive applications to set aside proceedings on different grounds of objection, all of which were discoverable at the time of the first application.

**THIS** was a rule, calling on the plaintiff to shew cause why execution and subsequent proceedings on a warrant of attorney should not be set aside. The plaintiff had duly entered up judgment on a warrant of attorney in an action of debt, and in November, 1839 he took the defendant in execution; but the ca. sa. purported to command execution to satisfy "damages" recovered on non-performance of "promises."

In Michaelmas term, 1840, the defendant made an unsuccessful application on summons before *Gurney B.* at chambers, to be discharged out of custody for defects in the warrant of attorney; and then obtained a rule nisi in this Court for the same purpose, which was discharged. It did not appear that on either of those occasions any objection was made to the writ.

In March, 1841, the defendant took out a summons before *Alderson B.* to set aside the execution on the ground of the variance between the writ and the judgment; but the learned Baron dismissed the summons, being of opinion that the application was too late. In last Easter term the present rule was granted; and the plaintiff obtained a cross rule nisi to amend the writ by the judgment.

*Martin* now shewed cause against the first and supported the second rule (a). The variance between the writ and the judgment is a mere irregularity, which the Court will amend: *M'Cormack v. Melton* (b), *Arnell v. Weatherby* (c). Again, the defendant ought to have taken any objection which he had to the writ at the time of his application to set aside the warrant. By not having done

(a) June 18th, before Lord Denman C.J., *Patteson, Williams and Coleridge Js.*

(b) 1 A. & E. 331; S. C. 3 N. & M. 881.

(c) 1 C., M. & R. 831.

so, he is now precluded: *Reg. v. The Manchester and Leeds Railway Company* (a).

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*Kelly* and *Knight* contra. The writ is not irregular only, but wholly void for want of a judgment to support it. If the plaintiff had been sued in trespass, and had set out the judgment and execution in his plea, the variance would be fatal on general demurrer. The prisoner is illegally in custody, and may apply at any distance of time from his arrest for discharge: *Anon.* (b), *Smith v. Sandys* (c), *Mortimer v. Piggott* (d). [Lord Denman C.J. The ground of this objection existed at the time of the defendant's application to a judge at chambers. Is it a proper course of practice to reserve objections for successive applications? Coleridge J. If the variance is error, may you not have released it?] It does not appear that the variance was then discovered. But that is immaterial: a discharge from illegal imprisonment is *ex debito justitiæ*, and not matter of discretion. A prisoner has no other remedy. By an action he might obtain damages, but not a discharge. [Lord Denman C.J. But we may amend the writ on the authority of *Arnell v. Weatherby* (e).] The writ is now matter of record, and being the act of the plaintiff recorded by the Court cannot be altered by the Court: *Turner v. Barnaby* (f), *Anon.* (g). [Coleridge J. In *Thorpe v. Hook* (h), where an application was made to amend a writ of execution, *Littledale* J. said, "The constant current of practice has been to allow such amendments."] That case is distinguishable. Here the writ is void, and a year and day have elapsed after judgment signed: an amendment would have the effect of giving the plaintiff a new writ on that judgment; but a new writ would be void also without a

(a) 8 A. & E. 413; S. C. 3 N. & P. 439.

(b) 1 Ventr. 259.

(c) 3 A. & E. 693; S. C. 5 N. & M. 59.

(d) 2 Dowl. P. C. 615.

(e) 1 C., M. & R. 831.

(f) 2 Salk. 566.

(g) 3 Salk. 31.

(h) 1 Dowl. P. C. 501.

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scire facias: *Mortimer v. Piggott* (a). [Patteson J. There no writ whatever had issued within the year and day.] No legal writ has issued here. [Coleridge J. But there is a writ in point of fact.] In analogous cases the Courts exclude amendments which would deprive the defendant of a statutory benefit, as of the Statute of Limitations, or of a supersedeas: *Lush's Pract.* (b). In the present instance the defendant is entitled to bar the plaintiff's proceedings on the judgment, and put him to a scire facias: he has also a right of action for false imprisonment. An amendment, if allowed, would take away both rights: if disallowed, the plaintiff is not without remedy, as he may revive the judgment. The Court will leave him to that remedy: *Partridge v. Welbank* (c). Again, if the defendant's laches preclude him from applying to set aside the execution, as now contended, the plaintiff's laches also will preclude an amendment. He should have asked to amend within the year and day. [Lord Denman C. J. If defendant had objected to the writ on his first summons at chambers, the plaintiff would have been in time to ask leave to amend.]

Lord DENMAN C. J.—I do not intend to lay down any general rule that a party, who has once been defeated on objections taken to the proceedings, may not make a second application of a similar kind, on objections which he then omitted to take, nor to express any opinion how far the case of a prisoner would form an exception to any such rule; because I entertain no doubt in the present case that we may make the amendment of this writ which we are asked to do. The error is a mere technical one, of the slightest description—a mistake of the attorney's clerk—which the Courts have always shewn a readiness to amend. In the case of *Arnell v. Weatherby* (d) a misstatement in the writ of the sum recovered on the judgment was amended, which was as much a variance as the present;

(a) 2 Dowl. P. C. 615.

(c) 1 M. &amp; W. 316.

(b) Pp. 384, 385.

(d) 1 C., M. &amp; R. 831.

and in *Thorpe v. Hook* (a) my brother *Littledale*, than whom no judge on the bench was less disposed to shew favour to errors where the liberty of the subject was at stake, allowed an amendment to be made in a writ of execution which had the *apparent* effect of introducing a different person into it as the defendant. We cannot but see that without this slip of the pen the writ would be in all respects regular.

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PATTESON J.—In 1 *Tidd's Pract.* (b) it is said that a writ of execution may be amended, under the Statute of Amendments, by the judgment or by the award of it on the roll, or by former process. There cannot be any doubt therefore as to the power to amend after it has become matter of record. The notion that we cannot amend without a scire facias is inconsistent with the very nature of an amendment. A scire facias gives a new writ; an amendment corrects an existing one.

Rule, for setting aside execution, discharged.

Rule, to amend, absolute.

(a) 1 Dowl. P. C. 501.

(b) P. 71§ (9th ed.).

DOE d. Lyster and others v. GOLDWIN.

Saturday,  
June 19th.

**EJECTMENT.** At the trial before Lord Denman C.J., at the sittings in Middlesex after Trinity term, it appeared that the defendant held the premises sought to be recovered as tenant to Colonel *Lyster*, one of the lessors of the plaintiff. In September, 1837, a notice in his name to quit on the 23rd March, 1838, had been given, which it was admitted was sufficient to determine the tenancy if a notice by proviso that he should remain in receipt of the rents until sixty days after default made in payment of the annuity:—*Held*, as against the tenant, that before default the mortgagor had a sufficient interest in the premises remaining in him to entitle him to determine the tenancy by a notice to quit.

During the continuance of a tenancy from year to year the landlord mortgaged the premises, to secure the payment of an annuity. The mortgage deed contained a

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him could determine it. After the demise to the defendant, Col. *Lyster* executed a mortgage, to which his wife was a party, bearing date March, 1836, to the Globe Insurance Office, to secure an annuity. By this mortgage the legal estate was vested in *J. W. Freshfield*, in trust, among other things, to permit *Sophia Lyster* (the wife of Col. *Lyster*) to receive the rents until default made for sixty days in the payment of the annuity. In March, 1838, the day before the notice to quit expired, the mortgagees gave notice to the defendant to pay to them the accruing rent, but there was no other evidence of any default. The declaration contained demises bearing date January, 1839, by Col. *Lyster* and his wife—by Col. *Lyster* alone—by another party—and by *J. W. Freshfield*. The Lord Chief Justice directed a verdict for the plaintiff, reserving to the defendant leave to move to enter a nonsuit. A rule was obtained accordingly, against which

Humfrey shewed cause (a). The notice to quit was good, on the ground that it was given by an agent whose authority has been recognised by the legal reversioner, *J. W. Freshfield*. That recognition is sufficiently testified by his being a lessor of the plaintiff in this ejectment. At nisi prius the case of *Right d. Fisher v. Cuthell* (b) was relied upon, deciding that a notice given by two of three executors of the landlord, was not sufficient; but there was a special condition that the lease should be determined by notice in writing under the "respective hands" of all who were entitled to give it. The case of *Goodtitle v. Woodward* (c) decides that, though a notice to quit, if signed by joint tenants, must be signed by all of them, yet it is sufficient, where it is given by an agent, if his authority be subsequently recognised. [*Patteson J.* There

(a) Sittings after Hilary term, Tuesday, Feb. 2nd, before Lord Denman C.J., *Patteson* and *Cole-ridge Js.*

(b) 5 East, 491.

(c) 3 B. & Ald. 689.

the notice purported to be given by an agent. *Coleridge J.* The authority of that case is shaken by the case of *Doe d. Mann v. Walters (a).*]

But if the notice by Col. *Lyster* is not good, given by him as an agent, it is good considered as given in his own right. Col. *Lyster* had, in respect of his wife's interest, the management of the property, and was in receipt of the rents and profits. The legal estate, by the provision in favour of the mortgagor, remained in him or his wife, to the extent of leaving to him the government of the property, and the right to create new and determine old tenancies. It would be of most dangerous consequence if the owner of property so situated had lost all right of controul over his tenants: many of the largest landholders have the strict legal estate outstanding. [*Patteson J.* In many cases the tenancy has commenced after the mortgage; the tenants would then be estopped from disputing their landlord's title: in others express provision is made in the deed. *Coleridge J.* Can you contend that, if a lease were made determinable at particular periods, the landlord, who, after the commencement of the tenancy has mortgaged his interest, would be entitled to determine it?] In *Wilkinson v. Hall (b)* the plaintiff had mortgaged land in fee, with a proviso for redemption in 1834, but it was agreed that the mortgagee should not be entitled to call in the principal before December, 1840, provided the interest were regularly paid in the meantime, and it was further agreed that the mortgagee should hold and enjoy the premises, and take the rents, until default; and it was held that, though the fee passed by the mortgage, the latter part of the deed operated as a redemise till December, 1840, defeasible if the interest was not paid in the meantime.

Jervis contra. It must be considered now settled that a notice to quit must be good at the time it is given, so that

(a) 10 B. & C. 626; S. C. 5 M. & R. 357.

(b) 4 Scott, 301; S. C. 3 Bing. N. C. 508.

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the tenant may then safely act upon it: *Right d. Fisher v. Cuthell* (a), *Doe v. Walters* (b). In the latter case all the judges were of opinion, that, at all events, the recognition of the authority must have taken place before the time of the demise in the declaration. If bringing an action were a sufficient recognition, anybody might give a notice upon the chance of its being adopted. [*Patteson J. Doe d. Rhodes v. Robinson* (c) is an authority that it is not sufficient.]

It is clear that the legal estate was not in Col. *Lyster* when he gave the notice, and an authority to receive the rents could not operate as a demise: his right to receive them under the deed was not irrevocable. At all events the mortgagee might at any time call upon the tenant to pay the rent to him, and, if Col. *Lyster* in such a case would have any remedy, it would be against the mortgagee, and not against the tenant. It must be taken to be found that there had been a default in the payment of the annuity, as the mortgagee had given notice to the tenant to pay the rent to him. [*Coleridge J.* If Col. *Lyster* had an authority at the time to give the notice, a subsequent countermand by the mortgagee could not affect it.]

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—The question raised in this case was on the sufficiency of the notice to quit in respect of the party giving it. Mr. *Lyster*, the first lessor, had given it in his own name, and apparently for his own benefit: he had made the demise to the defendant, and subsequently mortgaged to the Globe Insurance Office to secure an annuity. By the mortgage deed the legal estate passed to Mr. *Freshfield* in trust, among other things, to permit *Sophia Lyster* (the wife of Mr. *Lyster*) to receive the rents until default made for

(a) 5 East, 491.

(c) 3 Bing. N. C. 677; S. C. 4

(b) 10 B. & C. 626; S. C. 5 M. Scott, 396.

& R. 357.

sixty days in the payment of the annuity. In September, 1837, the notice to quit was given. In March, 1838, the day before it expired, the mortgagees gave notice to the defendant to pay the then accruing rent to them, but there was no other evidence of any default made. Under these circumstances the question is, whether the defendant could safely act under this notice at the time when it was given; for, if he could not, no subsequent adoption or satisfaction of the notice by any one will make it valid: *Doe d. Mann v. Walters (a)*. Now, if Mr. Lyster be considered as merely the agent of the mortgagees, the notice is bad, both because the notice is in his own name and not in that of his principals, and also because no authority from them was proved, the joining in the ejectment being no evidence of such authority: *Doe v. Walters (a)*. But Mr. Lyster was not merely agent. According to the case of *Wilkinson v. Hall (b)*, the clause in the mortgage deed as to Mrs. Lyster receiving the rents and profits, till default made for sixty days in payment of the annuity, operated as a redemption to her, and by law to her husband, till that time. Mr. Lyster therefore had a legal estate in the reversion when he gave the notice to quit, no default appearing to have been then made, and the defendant might safely have acted upon it.

For these reasons we think the notice to quit sufficient, and that this rule must be discharged.

Rule discharged.

G.

(a) 10 B. & C. 626; S. C. 5 M. (b) 4 Scott, 801; S. C. 3 Bing. & R. 357. N. C. 508.

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GREEN v. EALES (a).

A covenant by a lessor to repair the external parts of the demised messuage comprises the boundary walls of it, though they adjoin other buildings. At all events the lessor is liable under it to compensate the lessee for the damage arising from non-repair of such a wall, which arises after the adjoining building has been pulled down, though the damage be a consequence of such pulling down, he having made no attempt to prevent the damage arising from the further sinking of the wall, and though the adjoining building

was pulled down in execution of powers given by an act of parliament, which contained a clause for the compensation of persons sustaining damage by the exercise of them.

Quere, whether in such a case an action will lie against the lessor before a reasonable time has elapsed for the restoration of the wall by him, and *held* that, even if so, an action would be maintainable before such reasonable time had elapsed, he having, on application, contested his liability to do repairs, and given an unqualified refusal to do them.

In such an action, the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the cost thereof, the jury having found that this was the proper mode of restoring it.

He may also recover the price of damage done to plate glass and fixtures in consequence of the sinking of the wall. But the lessee cannot recover the rent paid by him for the occupation of other premises, during the progress of the repairs, though during that time the demised premises were not safely habitable.

COVENANT. The declaration set out an indenture of demise, executed by the defendant on the 6th March, 1838, by which the defendant demised to two persons named therein, "a certain messuage, tenement or dwelling-house, curtilage, outhouses and premises, together with certain other small tenements and premises in the said indenture particularly mentioned and described (except as in the said indenture is excepted) for an unexpired term of years. And the defendant did thereby covenant, promise and agree to and with the said &c., their executors and administrators, that he the said defendant should and would repair and keep in good and tenantable repair, all the external parts of the said thereby demised premises, in every respect whatsoever (except the glass and lead of the windows thereof), during the said term." The declaration then set out several assignments of the term, finally vesting it in the plaintiff. By virtue whereof the plaintiff afterwards, to wit, on the day and year last aforesaid, entered into and upon the said demised premises, and became and was, and from thence hitherto hath been and still is possessed of the same, for the residue of said term so thereof granted as aforesaid; and the plaintiff avers that he the plaintiff took the said demised premises by assignment thereof to him as aforesaid, for the purpose of dwelling and residing therein, and carrying on

(a) Decided at the sitting after term (June 19).

and conducting therein and thereon a certain trade or business, to wit, the trade or business of a linen draper, which said trade or business, subject to such interruption as hereinafter mentioned, he the plaintiff hath, from the time of the making of such assignment to him as aforesaid, conducted and carried on in and upon the said demised premises, yet the plaintiff in fact saith that the defendant did not nor would, during the continuance of the said demise, repair and keep in good and tenantable repair, all or any part of the external parts of the said demised premises (except the glass and lead of the windows thereof), according to the form and effect, true intent and meaning of his said covenant in that behalf, but, on the contrary thereof, wholly declined and neglected so to do; and after the said assignment to the plaintiff as aforesaid and during such his possession as aforesaid, to wit, from the making of the said assignment to the plaintiff hitherto, the defendant suffered and permitted the external parts of the said messuage or dwelling-house, and of the other buildings so being on the said demised premises as aforesaid, to be and continue, and the same were, for and during all that time, so utterly ruinous, prostrate, fallen down and in such great decay, and in such a dangerous state and perilous condition, for want of needful and necessary repairing the said external walls thereof, and keeping the same in good and tenantable repair, that by means thereof, and from no other cause, to wit, after the assignment to the plaintiff and long, to wit, ten months, before the commencement of this suit, to wit, the day and year last aforesaid, it became and was very hazardous, and wholly impossible for the plaintiff or his family any longer to inhabit, dwell or remain in or on any part of the said premises, or to carry on or conduct therein or thereon, or on any part thereof, the said business of a linen draper, until the external part of the said messuage or dwelling-house, and of the said other buildings, had been and were repaired and put into good and tenantable repair, whereof the defendant afterwards, to wit, on the day and year aforesaid, had due notice, and the defendant then, to wit, on the day

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and year last aforesaid, was applled to and requested by the plaintiff to repair and put the same into good and tenantable repair, according to his said covenant. But defendant then, and from thence hitherto hath, wholly refused and declined so to do, wherefore the plaintiff, and because he could not otherwise in any manner continue to dwell or reside in the said demised premises, or any part thereof, or in any manner to carry on therein or thereon his trade or business without great and imminent danger to the lives of the plaintiff, his family, servants and agents, and without the destruction of his goods and chattels, wares, merchandize and effects, then being in and upon the said demised premises, did accordingly, and long before the commencement of this suit, to wit, on the day and year last aforesaid, necessarily and unavoidably quit and leave the said demised premises, with his said family, and did thereupon necessarily remove therefrom his said goods, chattels, wares, merchandize and effects, then being of great value, to wit, 10,000*l.*, to a place of safety. And the plaintiff further saith, that in order to render the said demised premises in any way habitable or tenantable, he the plaintiff was forced and compelled to commence repairing the damage which had happened and been done to the said demised premises, by reason of the defendant's said breach of covenant, and hath in great measure repaired the said external parts of the said demised premises, and hath, in and about the doing thereof, necessarily paid, laid out and expended, and become liable to pay, divers sums of money, amounting in the whole to 1000*l.* And the plaintiff further saith, that by means of the premises aforesaid, he the plaintiff for a long time, to wit, from the time of such ruin, prostration and decay of the said external walls and buildings, and of such necessary removal by the plaintiff as aforesaid, hitherto hath been deprived of divers great gains and profits, which he otherwise could and would and might have derived and acquired from residing and dwelling and carrying on and conducting, in and upon the said demised premises, his aforesaid trade or business, and the plaintiff has moreover and by means of the premises been forced and compelled to

incur great expense of his monies and great liability, and hath necessarily incurred great expense of his monies and liability in and about the necessary finding and providing for himself and his family of a certain other place of residence, and also a place wherein and whereon he the plaintiff might carry on and conduct his aforesaid trade and business until the said demised premises can be made fit and safe for the plaintiff to reside in and carry on his said business as aforesaid, and in and about the removal of himself and his family, and his goods and chattels, wares, merchandizes and effects, from the said demised premises to the places respectively above in that behalf mentioned, to wit, to the extent of 500*l.*, and divers of the said goods, wares, merchandizes and effects, of great value, to wit, 500*l.*, became and were necessarily and unavoidably very much injured and damaged and lost by and in consequence of such removal, and by reason of the premises the plaintiff has sustained and is likely to sustain divers other losses and damage.

Pleas :—1. Non est factum.

2. That he did not suffer the external parts, &c. to be or continue out of repair, so that the plaintiff could not dwell therein modo et formâ.

3. That although true it is that the said external parts of the said messuage and dwelling-house and buildings were ruinous, prostrate, fallen down and in great decay, and in a dangerous state and perilous condition, as in the declaration alleged, yet the defendant says that the said state and condition of the said premises was occasioned by a sudden and unforeseen act and event done and occasioned by other persons, to wit, the mayor, aldermen and burgesses of the city of Exeter, without the knowledge or consent of the defendant, to wit, the pulling down of certain premises next adjoining to the said messuage and dwelling-house and buildings (the external walls of the same messuage, dwelling-house and buildings having been at all times after the said assignment to the plaintiff, in the declaration mentioned, and being then, to wit, at the time of the happening of the said act and event, retained and kept in good and tenantable repair, in all

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respects, except the glass and lead of the windows, by the defendant, in pursuance of his said covenant). And the defendant says, that the said external parts of the said messuage and dwelling-house and buildings could not, upon and after the happening of the said act and event, be immediately repaired and restored, but that a reasonable time was thereupon necessarily required by the defendant for repairing and restoring the same, and for performing the said covenants. And the defendant says, that immediately upon the happening of the said act and event of the falling of the said messuage and dwelling-house and buildings into the said state and condition, and from thence hitherto, he the defendant hath always been ready and willing to perform his said covenant, and to repair, and to retain and keep in good and tenantable repair, all the external parts of the said premises, but the defendant says that such reasonable time as was necessarily required as aforesaid after the happening of the said act and event, and after the said messuage and dwelling-house and buildings had thereby so fallen into such state and condition as aforesaid, for the repairing the external parts of the said messuage and dwelling-house and buildings, and retaining the same in good and tenantable repair, and for performing his said covenant in that behalf, had not elapsed before the commencement of this suit."

That although true it is that the said external parts of the said messuage or dwelling-house and buildings were ruinous, prostrate, fallen down and in great decay, and in a dangerous state and perilous condition, as in the declaration alleged, yet the defendant says that the said state and condition of the said premises was occasioned by a sudden and unforeseen act and event, done and occasioned by other persons, to wit, the mayor, aldermen and burgesses of the city of Exeter, without the knowledge or consent of the defendant, to wit, the pulling down of certain premises next adjoining to the said messuage and dwelling-house and buildings, the external walls of the same messuage and dwelling-house and buildings having been at all times after the said assignment to the plaintiff in the declaration mentioned, and being then,

to wit, at the time of the happening of the said act and event, retained and kept in good and tenantable repair in all respects, except the glass and lead of the windows, by the defendant, in pursuance of his said covenant. And the defendant says, that the said external parts of the said messuage and dwelling-house and buildings could not immediately upon and after the happening of the said act and event be repaired and restored, but that a reasonable time was thereupon necessarily required by the defendant for repairing and restoring the same, and for performing his said covenant. And the defendant says, that immediately on the happening of the said act and event, and the falling of the said messuage and dwelling-house and buildings into the said state and condition, and from thence hitherto, he the defendant hath always been ready and willing to perform his said covenant, and to repair, and to retain and keep in good and tenantable repair, all the external parts of the said premises. But the defendant says, that before such reasonable time as was necessarily required as aforesaid, after the happening of the said act and event, and after the said messuage and dwelling-house and buildings had thereby so fallen into such state and condition as aforesaid, for the repair of the external parts of the said messuage and dwelling-house and buildings, and retaining the same in good and tenantable repair, and for performing his said covenant in that behalf, had elapsed, to wit, on the 1st day of December, in the year of our Lord 1839, the plaintiff commenced to repair and rebuild the said messuage and dwelling-house and buildings, and did then repair and rebuild the same, and thereby then by the act of the plaintiff necessarily hindered and prevented the defendant from repairing and rebuilding the same, and performing his said covenant in that behalf, as he might and otherwise would have done."

Issue was joined by the plaintiff on the first and second pleas, and to the third and fourth he replied *de injuriâ*.

The cause was tried before *Rolfe* B. at the Spring assizes for the city of Exeter. It appeared that the house, the prin-

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cipal subject of the demise, abutted on and adjoined a certain other house, called the Swan tavern, between which and the plaintiff's house there was an ancient wall of considerable thickness, in which beams and rafters from both buildings were fixed. By a local act of parliament, 4 *Will. 4* (26th March, 1834), for improving the city of Exeter, and removing the markets, the corporation were authorised to erect two market places, and to make avenues and approaches thereto, and for those purposes to purchase and take down certain houses and buildings mentioned in the schedule of the act. In that schedule were comprised "part of the Swan tavern and offices," which, as above mentioned, adjoined the plaintiff's house. The statute contained a clause for indemnifying the owners of property for any injuries sustained in the execution of the powers given by the act (a).

On the 7th October, 1839, in pursuance of these powers, the materials of the Swan tavern were put up for sale, the purchasers being required to remove them. One of the conditions of the sale was, that the purchasers should cut off any joists, &c. likely by removal to injure other property. Several beams of the Swan tavern rested in the dividing wall. On the 18th October the removal of the material was completed, and the dividing wall between the two premises was

(a) That clause was as follows :
" And be it further enacted, that in case any messuages or buildings, lands, tenements, or hereditaments shall be damaged or injured by or in the taking down of any of the messuages or buildings to be taken down for the purpose of or otherwise in the execution of this act, the mayor, bailiffs and commonalty shall, and they are hereby authorised and required, by and out of the money to arise by virtue of this act, to make to the owners and occupiers of such messuages and buildings, lands, tenements and hereditaments so damaged or

injured, such compensation and satisfaction for such damage or injury as the said mayor, bailiffs and commonalty shall in their judgment think reasonable, by payment of a sum of money in gross, and in case the owners or occupiers shall think the satisfaction offered to them by the said mayor, bailiffs and commonalty not sufficient, then the same shall be ascertained and settled by a jury in manner therein provided for ascertaining the value of messuages, lands and hereditaments to be purchased, taken, or required for the purposes of this act."

left without the support it had before received from the Swan tavern. On the same day, and shortly after the removal of the beams, the dividing wall deviated from the perpendicular and a fracture appeared between it and the plaintiff's house. Evidence was given to shew that the plaintiff could not with safety remain in the house during the necessary repairs, and that he quitted and rented other premises. Application was immediately made to the defendant to do the repairs required, but he on the 4th November refused, contending that the corporation were the parties liable. The defendant took no steps, before or during the progress of the removal of the Swan, to prevent, by shoring or other means, damage to the plaintiff's wall or premises. The plaintiff himself, on the defendant's refusal to repair, began the repairs and rebuilt the wall. It also appeared that the wall of plaintiff's house would have required no repair during the term, had the wall of the Swan tavern not been removed. There was evidence to shew that it could not be properly made firm without rebuilding. The learned judge left it to the jury to say whether the rebuilding was, for the interest of both parties, the best mode of making the repair, and directed the jury to find separately the different items of damage sustained by the plaintiff in consequence of the non-repair of the wall. The jury found a verdict for the plaintiff, damages 507*l.* dividing that amount as follows:—

| | | | | | | |
|----------|---|---------------------------------------------------------------------------------------------------------------------|---|---------|---|---|
| | | Rebuilding the wall of the old house, including the shoring the wall, &c. - | } | £ s. d. | | |
| | | | | 214 | 0 | 3 |
| | | Plate glass broken by the sinking of the wall - - - - - | } | 25 | 0 | 0 |
| | | Papering and painting consequent on rebuilding wall - - - - - | | 11 | 0 | 0 |
| | | Costs of replacing fixtures, counters, &c. | | 90 | 0 | 0 |
| | | Architect's charges - - - - - | | 21 | 0 | 0 |
| £216 7 2 | { | Rent and taxes for premises taken during the rebuilding - - - - - | } | 107 | 0 | 0 |
| | | Alterations of such premises necessary to enable plaintiff to carry on his trade - | | 93 | 6 | 9 |
| | | Costs of restoring such premises to their original state, which plaintiff was bound by his tenure to make - - - - - | } | 16 | 0 | 9 |
| | | | | 507 | 7 | 9 |

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The learned judge gave the defendant leave to move to enter a verdict for him on all or either of the last three issues, or to reduce the damages. A rule was obtained accordingly, against which

Erle, Crowder and Cockburn shewed cause (a). There can be no doubt that the dividing wall was the external part of the plaintiff's premises. It was the boundary of them, and it is not the less his outer wall that another house is built against it on the other side. Under the covenants of his lease the landlord himself is bound to repair the external, the tenant the internal walls, and the distinction between the two kinds of wall is quite obvious. The internal walls are those which divide the house for the purposes of habitation, the external those which are built in a more substantial manner, and the solidity of which is essential to the very existence of the building. Then it is no excuse for not keeping that wall in repair that its insecurity was caused by the act, whether lawful or otherwise, of a third party. The landlord has bound himself by his covenant to keep his wall in repair, and he must repair damage to it however caused. It may be that an action would lie against the third party whose acts have caused the damage complained of, but that would not take away the benefit of the covenant of the defendant, which amounts to a guarantee of an indemnity from such acts. It is at least a very doubtful proposition, that it would be any answer in law to this action, that reasonable time had not elapsed for making the repairs, but there is now no difficulty on that point, for the defendant had positively refused to make them. The verdict of the jury comprises three classes of damage, and the plaintiff is entitled to retain his verdict in respect of them all. The jury have found that rebuilding the wall was the proper mode of repairing it. The next class is for damage done to fixtures and plate glass in the interior, all

(a) On Tuesday June 15th, before Lord Denman C. J., *Patteson* and *Williams* Js.

is damage sustained by the defendant's neglect to keep the outer wall in repair. The third class is the damage which the plaintiff sustained from the same cause from the house being uninhabitable. He is entitled to recover damage for that as proceeding from the defendant's neglect to perform his covenant as much as any other damage proceeding from the same breach.

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Bere and M. Smith contrà. The damage proceeded from a cause over which the defendant had no control, and against which no care could enable him to guard himself. The act complained of was done under the authority of a statute. It contains a clause for compensating persons who should suffer from the execution of its powers, and to that compensation the plaintiff must look to be indemnified. The case of *Moore v. Clark* (a) decided that an omission to do repairs, rendered necessary to a party wall by the Building Act, and not by the defendant's default, is no breach of a general covenant to repair. If a man were bound on a demise by a covenant to pay rent and the premises were taken from him by an act of parliament, the obligation would be at an end. The intention of the covenant was to bind the landlord to repair all walls that are external in the ordinary sense of the word. With regard to others, and to this wall in particular, they depended on the adjoining buildings for support, and it could not have been intended to make the landlord liable in this form of action for a withdrawal of that support for which both landlord and tenant would have their remedy against any person so wrongfully withdrawing it. The third and fourth pleas were drawn on the authority of a case in *Dyer* (b), which decides that when a covenant is

(a) 5 Taunt. 90.

(b) Page 33, pl. 10. That was a case of damage, treated by the judges as happening altogether by an act of God. An action was brought to recover a penalty on a breach of a covenant to keep in repair the banks of a stream in

land demised by the plaintiff to the defendant. "And by reason of a grand outrageous and sudden flood, which happened lately by reason of the subversion of the weirs in Devonshire, the banks were decayed and perished." "And, according to the opinion of *Fitz-*

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broken by a foreign force that the covenantor cannot resist, it is sufficient if he repairs the damage done within a reasonable time. [*Patteson J.* Both these pleas allege that the defendant was ready and willing to repair; that seems to me to be a material part of the pleas, and it was proved that the defendant positively refused.] The defendant was still entitled to a reasonable time to do the repairs before an action could be brought against him. The breach is so alleged in the declaration that it is very difficult to plead to it otherwise. The pleas are therefore a good answer; and upon the issue joined the defendant is entitled to a verdict, if either the defendant was willing to repair, or a reasonable time to do so had not elapsed: *Smith v. Dixon(a)*.

Supposing, however, the action to be maintainable against the present defendant on the covenant, the amount of damages given cannot be supported. Certainly the expense incurred by the plaintiff in providing another habitation cannot be recovered. It is like the case of a lessee bound to repair, with an exception of injury to the demised premises by fire or tempest. In that case, if the premises were injured in that manner, the lessor would not be bound to restore them (*b*).

Cur. adv. vult.

Lord DENMAN now delivered the judgment of the Court.—The first question in this case is, whether the wall between the house leased to the plaintiff and the Swan inn, which, upon the pulling down of the Swan, sunk and became useless, was “an external part of the premises” within the covenant in the lease.

herbert and *Shelley*, the law is, that the lessee is excused of the penalty. As the case would be of a house burnt by lightning, or overturned by the wind, inasmuch as that is the act of God, which cannot be resisted. But, nevertheless, he is bound to make good and repair the thing in a reasonable time, by reason of his covenant.”

(a) 7 A. & E. 1; S.C. 2 N. & P. 1.

(b) This point arose in *Weigall v. Waters* (6 T. R. 488), and was considered a doubtful proposition; the Court appear to have leaned in favour of it, but apparently on the ground that such an exception would not be tantamount to a covenant by the landlord to keep in repair in the cases excepted from the tenant's covenant.

We are of opinion that it was. We think that it was so even before the Swan was pulled down, but certainly afterwards. The external parts of premises are those which form the inclosure of them, and beyond which no part of them extends, and it is immaterial whether those parts are exposed to the atmosphere or rest upon and adjoin some other building, which forms no part of the premises let.

The second question is, whether upon the evidence it appeared that the defendant suffered the wall in question to be and continue ruinous for want of necessary repairs.

We are of opinion that it did so appear, for, though the sinking of the wall and the ruinous state of it at first was occasioned by the pulling down of the Swan, which was the act of the corporation, and not of the defendant, yet the defendant does not appear to have taken any precautionary steps to prevent the sinking, and suffered it to continue in that ruinous state, instead of forthwith setting about the repair of it.

The third question was, whether the defendant was ready to repair, and a reasonable time for the repair had elapsed before the commencement of the suit, or before the plaintiff proceeded to repair it himself.

We are of opinion that the defendant's readiness to repair is a material part of the plea, and that, as it appeared that the defendant had positively refused to repair at all, his plea and the issue on it is disproved, although the plaintiff proceeded to repair himself, and even commenced his action before the expiration of the time requisite for the repair of the wall, if set about immediately after it sunk.

The last question was as to the amount of damages. We are of opinion that the defendant was not bound to find the plaintiff another residence whilst the repairs went on, any more than he would have been bound to do so if the premises had been consumed by fire. Therefore the sums of 107*l.* 5*s.* for rent and taxes of the house taken by the plaintiff during the repairs, also the sum of 93*l.* 6*s.* 9*d.* for alterations and work done there, and the

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sum of 16*l.* for restoring them when the plaintiff quitted, together 216*l.* 7*s.* 2*d.*, must be deducted. The time during which the plaintiff was obliged to be in another house was indeed somewhat lengthened by the delay in commencing the repairs, but no calculation of that sort was made at the trial or submitted to the jury, and we do not think can now be fairly made.

The other items consist of the actual cost of repairing, of replacing the fixtures, of the surveyor's charge for superintendence, and of two sums for injury to the plate glass and plastering, occasioned by the sinking of the wall. All these, except the two last, are free from question, and, as to the two last, we think the plaintiff entitled, for it should seem that, if the defendant had taken proper steps to preserve the wall, whilst the corporation were taking down the Swan, those injuries would have been avoided.

The result is, that the rule must be made absolute to reduce the verdict to 291*l.* 0*s.* 7*d.*

Rule, to enter verdict for the defendant, discharged.

Rule, to reduce damages, absolute.

Unless the evidence must be taken to have shewn that the damage was the absolute and unavoidable consequence of the execution by the corporation of the duties imposed upon them by the statute, it should seem that their acts would no more be a justification for the neglect of the defendant to perform his covenant to keep the wall in repair than the act of any stranger. "Non-performance shall be excused by impossibility, or the act of God, if there be no default in the party."—*Com. Dig. Condition L. 12.* "So the performance of a condition shall be excused by an act of law which is necessary and inevitable."—*Id. L. 13.* "But if the conditions be improbable, and out of his power to do, yet it shall not be said to be impossible. Though it be out of human power, as, that it shall rain to-morrow."—*Id. D. 2.* "Non-performance shall not be excused by the act of a stranger."—*Id. L. 14.* That nothing is an excuse for the non-performance of a duty, unless the breach of it can be said to be utterly without the fault of him bound by the duty: see 6 *Edw. 4.* 7, pl. 18; *Weaver v. Ward*, Hob. 134; *Turbeville v. Stampe*, 1 *Ld. Raym.* 264. That the thing complained of results from the act of a stranger is no excuse: see *Bell v. Twentyman*, ante, 223.

G.

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The QUEEN *v.* WEST, one of the Proprietors of the
Hull and Selby Railway (a).

Saturday,
May 29th.

SIR *W. W. FOLLETT* had obtained a rule to shew cause why an inquisition, taken before, &c. on view of three bodies, should not be quashed. The three persons, on whose bodies the inquisition was taken, were stated therein to have been "travelling in certain carriages attached to and drawn forward by a certain steam-engine, called 'The Collingwood,' upon the line of the Hull and Selby Railway there being." The inquisition found "that the said steam-engine, called 'The Collingwood,' and the said railway carriages were moving to the respective deaths of the said, &c., and are the goods and chattels of and in the possession of the proprietors of the *Hull and Selby Railway* and of the proprietors of the *Leeds and Selby Railway*."

A coroner's inquisition, in which the things moving to the death were described as the property of the "Proprietors of the *Hull and Selby Railway*," was quashed, there being no corporation of that name or other similar name than "The *Hull and Selby Railway Company*."

Several objections were taken to the inquisition: among others, that one inquisition on several bodies was bad. The only objection on which the judgment of the Court turned was, "that the ownership of the things found to be moving to the deaths is badly described, inasmuch as the names of the proprietors are neither stated, nor the corporate names of the companies rightly adopted."

Sir *J. Campbell A. G.* As the rule is drawn up on reading the inquisition only, it must appear to be bad on its face, or this Court will not interfere. There may be two corporations of the names mentioned in the inquisition, and they may have been proprietors of the things moving to the deaths. The Court can assume nothing against the inquisition.

Sir *W. W. Follett* contrà. A conviction against "*Harrison and Company*" has been held a nullity even as to the party

(a) The case was set down for argument in the crown paper.

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named (a); and it seems admitted that the description in this case will not do unless the proprietors of the railways are incorporated by the names set out in the inquisition. But it cannot be assumed there are such corporations, and, if the public acts (b) constituting these companies are referred to, they will shew that there are no such corporations. [He was then stopped.]

Lord DENMAN C.J.—We ought to have some authority to shew the description will do: it is no more a legal description than if it said, “the proprietors of a tavern.” The description of the owners is material, as the deodand is to be levied on them.

PATTESON, WILLIAMS and COLERIDGE Js. concurred.

D.

Inquisition quashed.

(a) 8 T. R. 508.

(b) By 6 Will. 4, c. lxxx. (local and personal), s. 1, the persons therein named are made a corpo-

ration by the name and style of the “Hull and Selby Railway Company.”

Monday,
 May 24th.

BEADSWORTH v. TORKINGTON.

In case for disturbance of a right of common, the declaration alleged that the mayor, aldermen and bur-
CASE for disturbance of a right of common.

The declaration stated that the town and borough of Stamford, in the county of Lincoln, for a long time before and at the time of the defendant's committing the grievances after mentioned, was and still is an ancient town and borough, in which, at all the times in this declaration after mentioned, there of right was and still is a body politic and right in question for every resident freeman paying scot and lot. It appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford.

Held, that the declaration was not supported, as the right claimed was larger than that proved.

corporate, known by divers names of incorporation, and amongst others by the name of "The mayor, aldermen and burgesses of the town and borough of Stamford, in the county of Lincoln," and which said town and borough, during all the time aforesaid, hath been and still is situate within a certain manor, called "The Manor of Stamford," in the said county, whereof during all that time the Marquis of *Exeter* was and is the lord; and there were and are within the said manor divers, to wit, four fields, in which said fields, and in each and every of them, during all the time aforesaid, until the committing of the grievances hereinafter mentioned, there have been of right and still of right ought to be divers strips or balks of uncultivated land, bearing grass and herbage, containing in the whole divers, to wit, forty acres of such uncultivated land in each of the said fields.

That the said body corporate, before and at the time &c. after mentioned, have had and have used, and been accustomed to have and of right ought to have had, and still of right ought to have, *for every admitted freeman of the said town and borough* inhabiting within the said town and borough, and paying scot and lot within the same, common of pasture in and upon such parts of the said four fields as of right ought to be fallow, for divers, to wit, six commonable cows or heifers and three commonable calves under the age of one year, levant and couchant, within the said town and borough, that is to say, in every year when the said parts of the said fields have of right been fallow, or of right ought to be fallow, and after the said fallow have been or are sown with wheat at certain times of the year, to wit, from the 15th day of April to the 15th day of October.

That the plaintiff, before and at the time &c., to wit, on the 14th day of April, in the year of our Lord 1837, was and continually from thence hitherto hath been and still is one of the admitted freemen of the said town and borough, and for all the time last mentioned inhabited and dwelt and still doth inhabit and dwell in a certain messuage

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within the said town and borough, and also paid scot and lot within the said town and borough, and also was possessed of divers, to wit, four commonable cows and one commonable calf, under the age of one year, of him the said plaintiff, levant and couchant within the said town and borough. And by reason of the premises he, the plaintiff, during all the time of the committing of the said grievances, had and enjoyed, and of right ought to have had and enjoyed and still of right ought to have and enjoy, such common of pasture for divers, to wit, four of his commonable cows and one commonable calf, under the age of one year, levant and couchant within the said town and borough, at his free will and pleasure as aforesaid. Nevertheless the defendant, well knowing the premises, but contriving and intending to injure the plaintiff, and wrongfully and unlawfully and unjustly to deprive him of the benefit of his said common and pasture as aforesaid, to wit, on the 16th day of April and other days and times in the year 1837, in which year a part of one of the said four fields, called, &c. and a part of another of the said four fields, called, &c. were and of right ought to have been fallow, and were after the said fallow sown with wheat the said 16th day of April, and other days and times being between the 15th day of April and the 15th day of October in the last mentioned year, and whilst the said part of the said field, called, &c. and the said part of the said field called, &c. were and of right ought to have been fallow, and whilst the plaintiff was so entitled to use and exercise his said rights of common there as aforesaid, did wrongfully and injuriously dig, siuk and make, and cause and procure to be dug, sunk and made divers, to wit, 100 trenches, &c. &c. by reason whereof, &c. &c.

The second count set up the same right of common for sixty sheep from the 15th November to the 15th April.

Pleas:—1st. That the said body corporate, before and at the time of the committing the said supposed grievances in the first count of the declaration mentioned, had not

and have not had, nor have they been used and accustomed to have, nor ought they of right to have had, nor still ought they of right to have, for every admitted freeman of the said town and borough, inhabiting within the said town and borough and paying scot and lot within the same, common of pasture in and upon such part and parts of the said four fields as of right ought to be fallow for six commonable cows or heifers and three commonable calves under the age of one year, levant and couchant within the said town and borough, that is to say, in every year when the said parts of the said fields have of right been fallow or of right ought to be fallow, and after the said fallow have been and are sown with wheat, from the 15th day of April to the 15th day of October, in manner and form, &c. Conclusion to the country, &c.

2nd. That the plaintiff was not, at the time of the committing of the said supposed grievances in the declaration mentioned or of any of them, nor is he still one of the admitted freemen of the said town and borough, inhabiting within the said town and borough and paying scot and lot within the same, in manner and form, &c. Conclusion to the country.

3rd. That the plaintiff, at the time of the committing of the said supposed grievances in the first count of the said declaration mentioned, did not have or enjoy, nor ought he of right to have had or enjoyed, nor ought he still of right to have or enjoy such supposed common of pasture for his said supposed commonable cows and calf, levant and couchant within the said town and borough, in manner and form, &c. Conclusion to the country.

4th. That the plaintiff was not, at the time of the committing of the said supposed grievances in the first count mentioned, possessed of the said commonable cows and calf of him the said plaintiff, levant and couchant within the said town and borough, nor of any of them in manner and form, &c. Conclusion to the country.

5th. The fifth plea traversed the corporate right in the

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second count, and was the same with the first plea (*mutatis mutandis*). Conclusion to the country.

Issues were joined on the above pleas, and tried before Lord Abinger C. B., at the Lincolnshire summer assizes, 1839. It appeared in evidence that the right of common claimed was an ancient right. It was then objected for the defendant, that the Municipal Boundary Act, 2 & 3 Will. 4, c. 64 (sched. O), and 5 & 6 Will. 4, c. 76, had added to the old borough of Stamford (which formerly contained five parishes) part of the parish of St. Martin, Stamford Baron; that the right of common could not extend to the resident freemen of the new part of the borough, and therefore that the right alleged in the declaration to be in the resident freemen of the existing borough generally, was larger than the right proved. The plaintiff had a verdict, and leave was given to the defendant to move for a nonsuit.

Humfrey, in the Michaelmas term following, obtained a rule nisi accordingly, and also to arrest judgment in case the objection should be thought to appear on the record (a).

Sir J. Campbell A. G., Adams Serjt. and J. Hildyard, shewed cause (b), and referred to *Mellor v. Spateman* (c), to shew that the claim was properly made by the plaintiff through the corporation. They contended also that the new and old corporations were substantially the same, and that the only difference was, that the new corporation held the corporation property as trustees; that the plaintiff might have declared on his possession, without setting out any title, and that *Ricketts v. Salwey* (d) shewed it to be sufficient

(a) He obtained a rule also for a new trial, on the ground that a freeman had been improperly admitted as a witness in support of the right on indorsement of his name on the record, but this point was abandoned by the defendant

on the subsequent argument.

(b) At the sittings after last Hil. T. Feb. 5, before Lord Denman C. J. and Patteson J.

(c) 1 Saund. 342.

(d) 2 B. & Ald. 360.

to prove part only of the right alleged, provided that which was proved was enough to give a ground of action.

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Sir *W. W. Follett, Humfrey and Waddington* contra. In *Ricketts v. Salwey* (a) the failure of proof was as to the title to the right, the plaintiff setting out two titles and proving only one, whereas here the failure is in the proof of the right itself, and the allegation in question is indivisible. This record, if the verdict be allowed to stand, might hereafter be evidence of a larger right than actually exists. Even in a possessory action, if the plaintiff will allege title he must do so correctly: 1 *Wms. Saund.* 346, note to *Mellor v. Spateman*, citing *Dorner v. Cashford* (b), *Crowther v. Oldfield* (c). In this case, if the defendant chose to set out his right, he should have claimed individually, stating the actual facts, and shewing that the right of the old freemen was one which is preserved by the Municipal Corporation Act. The freemen are not members of the present corporations, which are distinct bodies from the former corporations. They referred to dicta in *Hopkins v. Mayor of Swansea* (d).

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action on the case for disturbance of right of common of pasture, to which plaintiff lays claim as an admitted freeman of the corporation of Stamford. The declaration states that the corporation possessed this right for all their admitted freemen, inhabiting within the said town and borough, and paying scot and lot; and in respect of this right being stated too largely,—inasmuch as the evidence went to shew it exercised by the freemen residing within the old borough, but since the Municipal Reform Act another parish was added to those limits, and thus the right was claimed for the freemen residing in that

(a) 2 B. & Ald. 360.

(b) 1 Salk. 369.

(c) 2 Ld. Raym. 1230.

(d) 4 M. & W. 640.

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in addition to those to whom the grant had been made,— a rule for entering a nonsuit was obtained. On the argument, this supposed variance was treated as immaterial, on the authority of *Ricketts v. Sayvey* (a), which decides that plaintiff may recover where he sets out a possessory title, though he prefer his claim in respect of something more than he possesses, provided he shew enough to make out a certain right, and the invasion of it by defendant. But, if the right itself be untruly stated, the judgment of *Abbott C. J.* in that case shews that the variance is ground of nonsuit. The point to be considered therefore is, whether it be untruly stated, a matter of great importance, since the act referred to has changed the extent and boundaries of almost every borough in England. This objection was supposed to be on this record by the operation of the Municipal Reform Act, in connexion with 2 & 3 *Will. 4*, c. 64, s. 35, Schedule O. But the declaration states only a present right in plaintiff, and such right may have been granted by the lord of the manor since the passing of the late act consistently with the declaration. It is the evidence given at the trial which shews plaintiff's claim to rest upon the state of things that previously existed, the old grant having been for the benefit of the freemen residing in five parishes, whereas it would enure according to the declaration to those residing in six. This is clearly a variance; it might have been cured by the statute, had it made the newly-defined borough the same in legal contemplation for all intents and purposes as the old. But no such provision was cited, and we have thought it right to go through that act in quest of a similar provision, and we have not found one. Here then is a claim of right in a certain class residing in parishes A. and B., when the evidence proves one to belong to those living in A. only. The rule for entering a nonsuit must be absolute.

Rule absolute.

(a) 2 B. & Ald. 360.

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CURLEWIS v. CORFIELD.

*Thursday,
May 27th.*

ASSUMPSIT. The plaintiff declared as indorsee, against the defendant as the drawer, of a bill of exchange accepted by *Daniel & Co.*, and dishonoured by them when due, of which the defendant had notice.

Plea, that the defendant had not due notice of the dishonour; on which issue was joined.

At the trial before *Patteson J.* at the Middlesex sittings in Hilary term 1840, the plaintiff proved a notice to the defendant to produce a letter dated 28th September, 1839, sent to the defendant, as containing a notice of dishonour of the bill on which the action was brought. The letter was not produced. The plaintiff's clerk was then called, and stated that on the 28th Sept. the plaintiff himself received notice of dishonour of the bill from his immediate indorser, and that in the course of that day he wrote a letter and gave it to witness, at the same time informing him of its contents, with instructions to leave it at the defendant's residence, and that witness delivered it accordingly about nine o'clock on that evening. The plaintiff's attorney was next called, and stated that on the 11th October he applied to the defendant, by letter, for payment of the dishonoured bill; that defendant came to witness and said that he had given the bill to one *Clarke* (one of the previous indorsers), who ought never to have negotiated it, but to have returned it; that it was the last of a set of bills of the like nature which *Clarke* had been endeavouring to negotiate; that he (defendant) was about to file a bill in equity against *Clarke* to restrain him from negotiating the bills, and would make the plaintiff a party; and that the bills had not been presented in due time to the acceptors. The defendant's counsel objected that there was no evidence to go to the jury of notice of dishonour, and cited *Solarte v. Palmer* (a) and *Boulton v. Welsh* (b). The learned judge gave leave to move to

In an action by indorsee against the drawer of a bill of exchange, proof that plaintiff, on the day on which he himself received notice of dishonour from the holder, wrote and sent a letter to defendant, and proof of notice to produce that letter as containing notice of dishonour, and that defendant, when applied to by plaintiff for payment of the bill, objected that it had not been presented to the acceptors in due time, but did not object that he had not had notice of dishonour, are, on default to produce the letter, evidence that it contained a regular notice of dishonour.

(a) 7 Bing. 530.

(b) 3 Bing. N. C. 688.

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enter a nonsuit on that ground, and directed the jury to find for the plaintiff, if they were satisfied on the evidence that the letter of the 28th September was a notice of dishonour; if not, to find for the defendant. The plaintiff had a verdict. *Barstow* in the same term obtained a rule nisi to enter a nonsuit.

Best now shewed cause (a). The question is, whether there was any evidence from which the jury might infer that the defendant had received due notice of dishonour. The cases of *Solarte v. Palmer* (b) and *Boulton v. Welsh* (c) do not apply where a presumption of notice is to be drawn by a jury from the facts. In *Wilkins v. Jadis* (d), which was an action by indorsee against the drawer of a bill, the defendant, two days after the bill became due, sent a person to the plaintiff to say that he had been defrauded of the bill, and should defend any action brought upon it. Lord *Tenterden* C.J. left it as a question for the jury on that evidence whether the defendant had had notice of dishonour. *Hicks v. The Duke of Beaufort* (e) and *Horford v. Wilson* (f) are also authorities to shew that a notice of dishonour may be presumed by a jury from circumstances. The case of *Pickin v. Graham* (g) appears at first sight an authority the other way, but it is distinguishable in this, that there the admission by the indorser, whom it was sought to charge, was made at a distance from town at a time which rendered his having knowledge of the dishonour in London physically impossible. The present case is also stronger than any of the others, because the admissions of the defendant are corroborated by independent evidence that a letter had been sent by the plaintiff to the defendant, on the day on which notice of dishonour ought to have been given, previous to

(a) May 27th, before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Ja.

(b) 7 Bing. 530.

(c) 3 Bing. N. C. 688.

(d) 1 M. & Rob. 41.

(e) 4 Bing. N. C. 229.

(f) 1 Taunt. 12.

(g) 1 C. & M. 725; 3 Tyr. 923.

which the plaintiff himself had received a similar notice from the holder.

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Barstow contra. The onus lies on the plaintiff to make out his case, by shewing affirmatively that due notice of dishonour of this bill was sent to the defendant. The letter of 28th September was not evidence of such notice, because the contents of it were not before the jury. Then was there any subsequent admission by the defendant which dispensed with proof of notice? *Borradaile v. Lowe* (a) shews that in such case there must be an unconditional promise to pay. Here, on the contrary, the defendant disputed his liability on the bill. The argument for the plaintiff is, that because the defendant objected to the presentment he admitted the notice. [Lord Denman C. J. How do you distinguish *Wilkins v. Jadis* (b)?] There, the communication was made by the defendant on the day on which he would, in due course, receive notice. [Lord Denman C. J. That fact was not alluded to in the judgment of Lord Tenterden.] [*Patteson J. Roberts v. Bradshaw* (c) strongly resembles the present case]. That was a question of identity between a notice of dishonour duly prepared, and a letter delivered to the defendant. The preparation of a notice on the day the bill was dishonoured was a material fact in connection with the delivery of the letter, and the case was decided before *Solarte v. Palmer* (d) had established what were the necessary ingredients of a notice of dishonour.


LORD DENMAN C. J.—The question is one of evidence. The delivery of a letter from the plaintiff to the defendant was proved. It was not produced at the trial when called for, which did not weaken any *prima facie* case, that might otherwise be made out against him, that he had received

(a) 4 Taunt. 93.

(c) 1 Stark. N. P. C. 28.

(b) 1 M. & Rob. 41.

(d) 7 Bingh. 530.

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due notice of dishonour. Then it is shewn that, when applied to for payment of the bill, the defendant did not dispute the claim on the ground that he had not had due notice, but put it on a totally different ground. I think the case of *Wilkins v. Jadis* (a) is not distinguishable.

PATTESON J.—In *Roberts v. Bradshaw* (b) there certainly is the distinction pointed out by Mr. *Burstow*, namely, that it was shewn that regular notices of dishonour had been prepared. There was a link wanting in the chain of evidence to prove that the letter contained notice of dishonour; but it was proved that it was sent on the dishonour of the bill, and the defendant did not produce it at the trial, though he was required to do so, as containing a notice of dishonour. Lord *Tenterden* left the case to the jury on that evidence. In the present case the plaintiff received notice of dishonour from the holder of the bill, and on the same day he wrote and sent a letter to the defendant. The latter was called upon to produce it at the trial and refused. That evidence would probably not be sufficient if it stood alone, but then in the conversation that afterwards took place he put his defence on other grounds than want of notice. Taking the case altogether, there was *some* evidence for the jury.

WILLIAMS J. concurred.

COLERIDGE J.—If *any* presumption of notice is to be drawn from the defendant resting his defence on his conversation with the plaintiff's attorney on other grounds than want of notice, it must be a presumption of *due* notice, and therefore *Solarte v. Palmer* (c) and that class of cases do not apply.

Rule refused.

(a) 1 M. & Rob. 41.

(b) 1 Stark. N. P. C. 28.

(c) 7 Bingham, 530.

1841.

Thursday,
May 27th.

WHEELER v. MONTEFIORE, Knt. and others.

TRESPASS for breaking and entering the dwelling-house of the plaintiff, and seizing his fixtures, goods and chattels. Pleas: 1, not guilty; 2, that the dwelling-house, fixtures, goods and chattels were not, nor were any or either of them, the dwelling-house &c. of the plaintiff. Issue joined. At the trial before Lord Denman C. J., at the sittings for Middlesex, after Michaelmas term, 1839, it appeared that the defendants, who were the sheriffs of Middlesex, had, on the 9th June, 1838, entered the house and seized the fixtures and chattels mentioned in the declaration, by virtue of a writ of fieri facias against the goods of one *William Franks*. *Franks* was tenant of the house for a term of years; and by indenture of mortgage, dated the 24th March, 1838, in consideration of the sum of 272*l.*, he had demised it to the plaintiff, to hold "henceforth" during the remainder which was unexpired of the term (save and except the last day), subject nevertheless to the proviso thereafter contained; and by the same indenture he assigned and transferred to the plaintiff the fixtures, utensils in trade, chattels and effects (particularized in the schedule) then in the house, or thereafter to be purchased, to hold for his absolute use and benefit, subject nevertheless to the proviso thereafter contained. "Provided always, and it is hereby agreed, that if the said *William Franks*, his executors &c., do and shall pay unto the said *James Wheeler* (the plaintiff), his executors &c., the said sum of 272*l.* of lawful money &c., with interest for the same, after the rate of 5*l.* &c., on the 24th day of June, now next ensuing, then and in such case, he the said *James Wheeler*, his executors &c., shall and will, on the request and at the expense of the said

A tenant for years of a house demised it, by indenture of mortgage, dated March 24th, to the mortgagee, to hold thenceforth for the residue of the term (less one day), subject to the proviso therein-after mentioned; and he also sold and transferred the fixtures and chattels therein to the mortgagee, to hold for his own use and benefit, but subject to the proviso thereafter contained. The deed contained a proviso for reconveyance, on payment of the mortgage money, on the 24th June then next, and also a proviso that, on non-payment on that day, it should be lawful for the mortgagee to enter upon, and receive and take the rents and profits of the said leasehold and other premises, and, if he should think proper, of his sole authority, to sell or underlet the premises, and to sell the fixtures and chattels.

Held, that the mortgagee's right to take possession did not attach until the 24th June, and that he could not maintain trespass for an entry, or for an asportavit of the fixtures and chattels before that day by a stranger.

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William Franks, his executors &c., reconvey the said premises to him or them, or as he or they shall direct, free from all incumbrances by the said *James Wheeler*, his executors &c. Provided also, and it is hereby further agreed, that if default shall be made in payment of the said sum of 272*l.* and interest, or any part thereof, on the day and time and in manner aforesaid, it shall and may be lawful for the said *James Wheeler*, his executors &c., to enter upon, receive and take the rents and profits of the said leasehold and other premises, and if he or they shall think proper so to do, of his or their sole authority, to sell and dispose of or underlet the said premises hereby granted and demised for all or any part of the said term therein, and to sell the said fixtures, chattels and effects, hereby assigned, by public auction or private contract, for the best price that can be obtained, and assign, grant a lease, or underlet the same premises, and deliver the said fixtures, chattels and effects, when sold or let, to the purchasers or purchaser, tenants or tenant thereof, or as they or he shall direct." The indenture then contained a declaration of the trusts for sale, and of the rents and profits of the premises in the mean time; and a covenant by *Franks* to repay the mortgage money on the 24th June.

After the indenture was executed the plaintiff did not enter, but *Franks* remained in occupation. On these facts the defendants applied for a nonsuit, on the ground that the plaintiff had only a reversionary interest, for an injury to which he could not maintain *trespass*. The learned judge gave leave to move to enter a nonsuit on that point; and the plaintiff had a verdict, with 200*l.* damages. In the next term a rule nisi was obtained accordingly, against which,

Kelly and *E. James* now shewed cause(a). The plea denies the plaintiff's possession of the house or fixtures or goods. The deed operated as a present demise of the house, sub-

(a) Before Lord Denman C. J., Patteson, Williams and Coleridge Js.

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ject to a reconveyance. There was no proviso that *Franks*, the mortgagor, should hold until default, which would be a re-demise, as in *Wilkinson v. Hall* (a), nor had the plaintiff treated him as a tenant, which distinguishes this case from *Partridge v. Bere* (b), cited at the trial. *Franks* was therefore a trespasser, whom the plaintiff could have ejected at any time, without a demand of possession: *Doe d. Roby v. Maisey* (c). The plaintiff had the actual possession by *Franks*. If *Franks* had no estate by re-demise, and was not treated as a tenant, or as a trespasser, he could only occupy as the agent or servant of the plaintiff, who may declare on such occupation as his own: *Bertie v. Beaumont* (d). Or supposing *Franks* to be a tenant at will, it is laid down in *Com. Dig. Trespass*, (B 2), citing 2 *Roll.* 551, l. 49, "If a stranger does a trespass to a lessee at will, which prejudices the land, the lessor may have trespass against him for the damage to the land, *for the possession of the lessee is his possession.*" [*Patteson J.* That must mean trespass on the case.] The proviso in the deed merely restrains the plaintiff from underletting before default made in repayment of the mortgage money.

Then as to the fixtures: *Longstaff v. Meagoe* (e) shews that they passed to the plaintiff by the demise of the house, if not, they passed by the assignment.

Lastly, the assignment vested the absolute property in the goods in the plaintiff, which drew to it the possession, so as to enable him to bring trespass for an *asportavit* by a stranger: *Hudson v. Hudson* (f). The proviso defers the power of sale until the 24th June. That does not affect the possession.

Taprell contra. The question is, whether the plaintiff had such possession as will support *trespass*. First, as to the house. By a demise for years no estate is vested in the

(a) 3 Bing. N. C. 508.

(d) 16 East, 33.

(b) 5 B. & Ald. 604; S. C. 1 D.
 & R. 272.

(e) 2 A. & E. 167; S. C. 4 N.
 & M. 211.

(c) 3 Man. & Ry. 107.

(f) Latch. 214.

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lessee; it merely gives him a right of action; and till he actually enters he has only an *interesse termini*. He cannot before he enters receive a confirmation or a release from the lessor: *Co. Litt.* 270, 296 b, *Shepp. Touchst.* (a). "But a plaintiff cannot maintain *trespass quare clausum fregit*, if he has not actual possession, though he has the freehold in law; so a bargainee shall not have trespass before entry, though the possession is transferred to him by the statute: *Com. Dig. Trespass*, (B 3), and see *Bac. Abr. Leases*, (M), *Cook v. Harris* (b), per *Holt C. J.* The dictum in *Roll.* cited in *Com. Dig.* (B 2), must be intended to apply to a lessor who has had actual possession. *Franks*, after the execution of the indenture, remained in lawful possession, *Partridge v. Bere* (c): he was neither a trespasser nor a servant, *Hitchman v. Walton* (d); and accordingly the plaintiff should have declared in case for an injury to his reversion: *Wilkinson v. Hall* (e).

As to the fixtures. It does not appear whether they were annexed or severed; they were not demised, but assigned. If they were fixed to the freehold they were parcel of it; *Colegrave v. Dios Santos* (f), *Boydell v. M^cMichael* (g), *Longstaffe v. Meagoe* (h); and *Franks*, but not the plaintiff, might bring trespass for the severance. If severed and carried away in one continued act, it is doubtful whether trespass would lie for them: *Taylor v. Cole* (i), per *Buller J.*; *Cubitt v. Porter* (k), per *Littledale J.*; *Amos on Fixtures* (l).

But thirdly, both as to the fixtures and the goods, a right to retain the possession of them was reserved to *Franks*, until the 24th June, under the terms of the deed: *Gordon v. Harper* (m), *Hall v. Rickard* (n), *Ferguson v. Christall* (o).

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| (a) P. 324. | (h) 2 A. & E. 167; S. C. 4 N. |
| (b) 1 Ld. Ray. 367. | & M. 211. |
| (c) 5 B. & Ald. 605; S. C. 1 D. | (i) 3 T. R. 292. |
| & R. 272. | (k) 8 B. & C. 270; S. C. 2 M. |
| (d) 4 M. & W. 409. | & R. 267. |
| (e) 3 Bing. N. C. 508. | (l) Pp. 239, 247. |
| (f) 2 B. & C. 76; S. C. 3 D. & | (m) 7 T. R. 9. |
| R. 255. | (n) 3 Campb. 187. |
| (g) 1 C., M. & R. 177. | (o) 5 Bingh. 305. |

In *Trenchard v. Hoskins* (a), *Hobert C. J.* laid down a rule of construction of deeds thus: "Every deed ought to be construed according to the intention of the parties, and the intent ought to be adjudged of the several parts of the deeds; as a general issue out of the evidence and intent ought to be picked out of every part, and not out of one word only." By this deed the fixtures and goods were assigned to the plaintiff, *habendum* from no particular day specified; and it is provided and "agreed" that the mortgagor shall repay the principal and interest on the 24th June, and that on default the plaintiff may enter on that day, and take the rents and profits of the leasehold and other premises, and, if he shall think proper, sell or underlet the said premises *demised*, and the fixtures. That is in effect an agreement that *Franks* might hold until default; *expressio unius est exclusio alterius*, "agreed" is the word of both parties: *Stevinson's case* (b), *Com. Dig.* (c). There is, therefore, on the true construction of these clauses, an express covenant by the mortgagor, that the plaintiff might on default enter on the 24th June, or sell on that day without entry, and on the other hand, an implied covenant on the part of the plaintiff, that he would not enter into possession until default made: *Earl of Shrewsbury v. Gould* (d), *Sampson v. Easterby* (e), *Salturn v. Houstoun* (f), *Stevinson's case* (b), *Duke of St. Albans v. Ellis* (g), *Doe d. Fisher v. Giles* (h), *Wilkinson v. Hall* (i), *Worsley v. De Mattos* (k), *Doe d. Pritchard v. Dodd* (l). *Franks* was entitled to retain possession until the 24th June, and the plaintiff must be nonsuited. (*Kelly* cited *Irons v. Smallpiece* (m).)

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Cur. adv. vult.

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| (a) Winch. 93. | (g) 16 East, 352. |
| (b) 1 Leon. 324. | (h) 5 Bingh. 421. |
| (c) Covenant, (A 2). | (i) 3 Bing. N. C. 508. |
| (d) 2 B. & Ald. 487. | (k) 1 Burr. 469, 475. |
| (e) 9 B. & C. 505; S. C. 4 M. | (l) 5 B. & Ad. 689; S. C. 2 N. |
| & R. 422. | & M. 838. |
| (f) 1 Bingh. 493. | (m) 2 B. & Ald. 551. |

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 v.
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Lord DENMAN C. J., at the sittings after this term (June 14), delivered the judgment of the Court.—This was an action of trespass for breaking and entering the plaintiff's house, and seizing fixtures and goods therein. The second plea denied that the plaintiff was possessed. The defendants were sheriffs of Middlesex, and had entered and seized under a writ of fieri facias against *William Franks*. *Franks* was a tenant for a term of years, and had demised the premises to plaintiff by way of mortgage, for the residue of his term, wanting one day. The plaintiff had not entered.

The deed of mortgage is dated March 24, 1838, and demises to the plaintiff to hold "henceforth during the remainder of the term, wanting one day, subject nevertheless to the proviso hereinafter contained." It also sells and transfers the fixtures and chattels to the plaintiff, "to hold for his own use and benefit, subject nevertheless to the proviso hereinafter contained." Then there are two provisos, one in the usual form for reconveyance, on payment of the mortgage money on the 24th June; the other that on non-payment at that day it shall be lawful for the plaintiff to enter upon and receive and take the rents and profits of the said leasehold and other premises; and, if he shall think proper so to do, of his sole authority, to sell or underlet the premises, and to sell the fixtures and the chattels.

There is no covenant that *Franks* shall remain in possession till the 24th June, but looking at the whole deed we are of opinion that the plaintiff's right to take possession did not attach until the 24th June, therefore, that the verdict found for him on the second plea is wrong, and a non-suit ought to be entered.

As regards the house the verdict would be wrong, independent of the proviso, because it is laid down in *Co. Lit.* 296 b, *Com. Dig. Trespass*, and many other places, that a lessee, before entry, cannot maintain trespass. And as regards the fixtures and chattels, though the property in them would pass by the deed at once in ordinary mortgages,

yet the terms of this deed preclude the plaintiff from taking possession till the 24th June, and in fact he had not taken them.

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Rule absolute.

GREEN v. STEER.

Thursday,
June 10th.

DECLARATION by the indorsee of the payee of a promissory note (a), payable two months after date, against the maker. The defendant's second plea was a special plea of bankruptcy of the payee "after the making of

In an action by the holder of a promissory note, indorsed generally by the payee, to a plea that the payee indorsed it after he became bankrupt, the plaintiff replied that he bona fide took and received the note before the payee became bankrupt, without notice of any act of bankruptcy, and not by way of fraudulent preference (b). It appearing that the payee indorsed the note in blank before he became bankrupt, to a person who delivered it after the bankruptcy to the plaintiff: — *Held*, that the defendant was entitled to the verdict on the issue.

(a) The note was in the following form :—

" July 10, 1839.

" Two month after date I promise to pay Mr. R. West, or bearer, the sum of 12l. 7s. for value received.

" Indorsed R. West.

" R. West.

Written across " Accepted, payable at *Drewett & Co.*, Bankers, London, to *Steer*."

A motion quia timet, was made by *Whitehurst* for the defendant, to enter a nonsuit on the ground that it was a bill and not a note. The Court said (*post*, 503) that he

was entitled to a rule, but it is understood that no rule was drawn up. Vide *Edis v. Bury*, 6 B. & C. 433; *S. C.* 9 D. & R. 492; *Block v. Bell*, 1 M. & Rob. 149.

(b) 2 & 3 Vict. c. 29. s. 1, enacts, " that all contracts, dealings, and transactions by and with any bankrupt really and bona fide made and entered into before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, bona fide executed or levied before the date and issuing of the fiat, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit or on whose account

such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing herein contained shall be deemed or taken to give validity to any payment made by any bankrupt being a fraudulent preference of any creditor or creditors of such bankrupt, or to any execution founded on a judgment, on a warrant of attorney, or cognovit given by any bankrupt by way of such fraudulent preference.

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the said note and before the indorsement thereof to the payee." "By reason of which said premises, and by force of the statute in such case made and provided, all the right, title, and interest of *R. West* (the payee), amongst other things, of and into the said note in the said first count mentioned, became and was and still is vested in the said *James Foster Groom*, *John Perry Clark*, and *Benjamin Thomas Gurson*, as assignees of the estate and effects of the said *R. West*, (the payee). And that the said indorsement of the said note by the said *R. West*, was not made until after he became bankrupt as aforesaid, and after the said note became so vested in the said *James Foster Groom*, *J. P. Clarke*, and *B. T. Gurson* as aforesaid, nor did the plaintiff until after that time have any interest in or title whatever to the said note."

The plaintiff replied, "that the said note was indorsed by the said *R. West* to the plaintiff, and being so indorsed was bonâ fide taken and received by the said plaintiff before the date and issuing of the said fiat, to wit, on the 1st day of September, 1839, and that he, the plaintiff, had not at the time of the said indorsement or of taking and receiving the said note as aforesaid, notice of any prior act of bankruptcy by the said *R. West* committed. And that the said note was not so indorsed by the said *R. West*, or so taken and received by the plaintiff by way of a fraudulent preference to the plaintiff or any other creditor or creditors of the said *R. West*."

The defendant rejoined that the said note was not bonâ fide taken or received by the plaintiff before the date and issuing of the said fiat in manner and form, &c. Conclusion to the country and similiter.

At the trial before Lord Denman C. J. at the London sittings after Easter term last, the jury found that the note had been indorsed by the bankrupt in blank, and delivered to his son before the date and issuing of the fiat, but they were not satisfied that it had been received by the plaintiff before that time. The learned judge treated this as a ver-

dict for the defendant, and directed it to be so entered, reserving leave to the plaintiff to move to enter a verdict.

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Sir *F. Pollock* moved (a) pursuant to the leave reserved. The plaintiff has a right to avail himself against the defendant of the title of any person through whom he claims. The jury having found that this note was indorsed by *West* to his son before the bankruptcy, it is immaterial when the son delivered it to the plaintiff. The plaintiff must be considered at the time of *West's* indorsement to have, by the hands of the son, taken and received the note. It cannot be disputed that the title has passed out of the bankrupt, and that it is not vested in his assignees, in whom therefore can it be but in the holder ?

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court.—This is an action on an instrument which the declaration treats as a promissory note, and it is brought by the indorsee against the maker.

The plea states the bankruptcy of the payee and indorser, and that the indorsement was not made until after the bankruptcy, when the interest in the note was vested in the assignees of the indorser. The replication is framed on the last bankrupt act 2 & 3 *Vict.* c. 29, s. 1, and asserts that the note was indorsed by the bankrupt to the plaintiff, and being so indorsed was *bonâ fide* taken and received by the plaintiff before the date and issuing of the fiat, and that the plaintiff had no notice of any prior act of bankruptcy, and that the note was not indorsed by way of fraudulent preference.

The rejoinder asserts that the note was not *bonâ fide* taken and received by the plaintiff before the date and issuing of the fiat.

(a) On Saturday, May 22, before Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

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At the trial it appeared that the note had been indorsed by the bankrupt in blank and delivered to his son, who had delivered it to the plaintiff. The jury found that it had been so indorsed and delivered to the son before the date and issuing of the fiat, but were not satisfied that it had been received by the plaintiff before that time. The learned judge treated this as a verdict for the defendant, and directed it to be so entered. We have no doubt that this direction was quite right: the issue relates by the very terms of it to the personal act of the plaintiff himself, in taking and receiving the note, and it lay upon him to prove that he had done so before the fiat. He has failed to satisfy the jury, and the issue is rightly found against him, and cannot be disturbed. But Sir *F. Pollock* argues for the plaintiff that when it is once found that the instrument had passed away from the bankrupt before the fiat, so that his assignees can have no claim, the plea of the defendant is negatived, and that the finding, with regard to the indorsement and delivery to the son, has rendered the issue in the form in which it is taken immaterial; that an indorsement in blank is an indorsement to the ultimate holder at the time when it was actually made in blank, therefore that the jury have found in effect that the note was indorsed to the plaintiff *bonâ fide* before the fiat, and it is immaterial when he took and received it. But we are of opinion that the knowledge or ignorance of the person who actually, not constructively, deals with the bankrupt, as to any prior act of bankruptcy is the material question, under 2 & 3 *Vict. c. 29*, and, as the plaintiff has not alleged any receipt of the note from the bankrupt by any one but himself, nor any ignorance of an act of bankruptcy in any one but himself, he has by his own pleading made himself the person actually dealing with the bankrupt, and made an actual receipt by himself before the fiat the material question, and, even if any state of circumstances found by the jury could have rendered that question immaterial, such a state of circumstances has not here been found. No rule can be granted.

This makes it unnecessary for Mr. *Whitehurst* to have a rule except as to the costs of the first issue—but, if he thinks proper, he is entitled to it.

G.

Rule refused.

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DOE d. COZENS v. COZENS (a).

IN the vacation after Michaelmas term, 1840, and after this case had been set down for argument in the new trial paper, the lessor of the plaintiff died; and in the following term a summons was taken out by the defendant, calling on the plaintiff's attorney to shew cause why the case should not be struck out of the new trial paper, on the ground that the ejectment had abated by the death of the lessor of the plaintiff. This summons was abandoned, and another summons taken out, calling on the plaintiff's attorney to shew cause why all proceedings should not be stayed till security for costs was given. This summons was heard before *Williams J.*, who, after argument and referring to the case of *Thrustout d. Turner v. Grey (b)*, refused to make any order, observing that, if there was anything in the point, it should be mentioned as a preliminary objection upon the rule for a new trial being called on for argument. On the argument for the new trial coming on in Easter term last (April 23rd), *Ludlow Serjt.*, for the defendant, renewed the application for security for costs. Lord *Denman C. J.* asked if any one still claimed the property in the same right as the deceased lessor of the plaintiff, and on an answer in the affirmative, the Court called on *Ludlow Serjt.* to shew cause against the rule for a new trial, and *Carrington* was heard contra.

If, pending a rule for a new trial in ejectment, the lessor of the plaintiff dies, the defendant is not entitled to have security for costs before the rule is argued.

Objection overruled (c).

(a) Decided in Easter term last (April 22nd).

(b) 2 Str. 1056.

(c) Ex relatione *Carrington*.

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SITTINGS AFTER TRINITY TERM.

IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

PANTON v. WILLIAMS.

Monday,
June 15th.

In an action for a malicious prosecution, though in it the question of reasonable or probable cause depends, not upon a few and simple facts, but upon facts which are numerous and complicated, and upon numerous and complicated inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do, or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge.

ACTION upon the case for, maliciously and without any reasonable or probable cause, having procured the defendant in error to be arrested and tried upon a charge of having forged a paper writing purporting to be the last will of *Jones Panton*. Plea, not guilty.

At the trial before Lord *Denman* C. J. at the sittings after Trinity term, 1839, the plaintiff in error tendered a bill of exceptions to the summing up of the learned judge.

The facts of this case, which were of a very complicated nature (a), will sufficiently appear, for the purposes of the question argued, from the following statement.

The defendant in error, *Ann Williams*, was an attesting witness of a certain document, purporting to be a valid testamentary paper of *Jones Panton* deceased, but alleged, with other papers, to have been forged by *Thomas Williams*. An indictment, for such alleged offences, against *Thomas Williams* was tried at the Central Criminal Court, on which he was acquitted. On his acquittal no evidence was offered against the defendant in error, nor against *Ellen Evans*, another attesting witness, who were separately indicted for the same offence, and they were consequently acquitted.

The case against the accused, *Thomas Williams*, consisted of proof of a number of circumstances which it was contended were inconsistent with his innocence.

Jones Panton, the testator, in the year 1822 succeeded to real property in Anglesey, Flintshire, Denbighshire, and

(a) The trial of the indictment against *Thomas Williams* took place at the Old Bailey, before *Parke* B. on Monday, April 9, 1838. It occupied five days. Except in the

extract from the bill of exceptions, by "plaintiff" is to be understood plaintiff in error, and by "defendant," defendant in error.


Merionethshire. He had also property in London and in other places. He had seven children; four sons, *Jones, Paul Griffith, Thomas*, and *William Barton* the plaintiff in error; and three daughters, *Martha*, married to the Rev. Mr. *Williams, Elizabeth Jane*, married to the Rev. *Bulkeley Williams*, and *Lauretta Maria*, married to the accused *Thomas Williams*. On the 8th December, 1823, he executed, on the marriage of his eldest son, a settlement on him in strict settlement, reserving to himself a life estate, all his lands in Anglesey, Flint, Denbigh, and Merioneth. He created a term for securing a jointure to his wife, and a provision for his six younger children, on his death, of 42,000*l.*, that is 7000*l.* each. This eldest son had issue daughters, who would be entitled to the estates settled.

The lands in these counties thus ceased to be subject to testamentary disposition.

The testator executed in due form several authentic testamentary instruments. By his will of the 5th November, 1828, he disposed of the possible reversion upon the failure of issue of his eldest son in favour of the plaintiff, Mrs. *Hamilton*, and Mrs. *Williams*, in succession; his unentailed lands and personalty he devised and bequeathed to the plaintiff, to Mrs. *Hamilton*, and to Mrs. *Williams*, jointly, and he made them executor, &c. Another authentic and formally executed testamentary paper bore date 17th November, 1829. After this date his eldest son died leaving daughters only, and by a will or codicil of the 27th April, 1831, he altered the disposition of the property, and left the whole of it to the plaintiff, with the exception of some legacies to Mrs. *Hamilton* and Mrs. *Williams*, and made him sole executor. A codicil of the 29th May, 1833, had the effect of reducing the legacy to the wife of the accused *Williams*.

The testator died the 26th May, 1837, in the 76th year of his age. The plaintiff and his wife continued to live with him till the time of his death.

It was in evidence that, on the 8th of May, 1837, the

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testator sent for his will, which, with the other testamentary papers, had been deposited with Mr. *Rumsay Williams*, a solicitor, whose daughter the plaintiff had married. The testator on the 12th of May delivered it to the plaintiff. He also on the 4th of May gave to him bank or stock receipts to a large amount, he gave him the money in the house, the wines in the cellar, of which he delivered the key as a symbol, and other property.

Paul Panton it appeared had some difference with his father in 1828, and never saw him afterwards. *Thomas* died leaving no issue.

On the death of the testator the plaintiff, believing himself to be the executor, without opposition from any one, took the direction of the funeral. He sent notice of it to the relatives, amongst others to the accused *Thomas Williams*, who attended the funeral, which was on the 2d of June, but did not attend the meeting which was to follow it for the purpose of reading the testamentary papers in the presence of the family, and the wills were therefore not read. It appeared that he did not mention the circumstance of being in possession of any testamentary papers to any members of the testator's family at that time. On the 9th of June the will was read in the presence of the brother of the accused. He took the date of the several papers produced by the plaintiff, but did not allude to the existence of any other in the possession of the accused.

About the 5th or 6th of June a correspondence took place between the plaintiff and the accused *Thomas Williams*, in which the latter made no allusion to, or statement of, being in possession of any testamentary papers of the deceased, but intimated his intention of entering a caveat against the proof of the papers in the plaintiff's possession.

On the 14th of June the accused *Thomas Williams* made an affidavit of scrips with a view of proving in the Ecclesiastical Court testamentary papers by the deceased in his possession, but he did no act which could bring knowledge to the plaintiff of the existence of such papers until the 26th of July, two months after the death of the testator.

The testamentary papers produced by the accused *Williams* were eleven in number, and three of them professed to be testamentary dispositions by the deceased, one dated 6th November, 1834, another 15th October, 1836, and another about twenty days before the death of the testator, 7th May, 1837. These instruments, with their attesting clauses, were in the handwriting of the accused *Williams*, but were undoubtedly subscribed by a genuine signature of the deceased.

It appeared that the effect of the wills set up by the accused was upon the face of them to distribute the property of the deceased among his children, but in reality they had no such effect, because, while giving the unsettled property to the wife of the accused, the wills gave only the property settled, and therefore incapable of passing by devise, to the plaintiff.

None of the writings were on such paper as is usually used for the preparation of important instruments. And the suggestion of the form of the criminality of *Williams* was, that he had on papers, originally written on in pencil and signed in ink by the deceased, written the alleged forgeries, having previously obliterated the pencil writing. One of the papers produced by the accused *Williams* was said to be instructions for a will, and bore date the 31st of May, 1834, and the will bore date the 6th of November, 1834. Evidence was given to shew that the accused *Williams* had been employed by the deceased to effect a partition of certain property in London, of which he was the tenant, jointly or in common, with some third person. Evidence was given that in the course of that employment papers had been in the possession of the accused, containing, in pencil, plans and descriptions of this property, and it was suggested that these had been submitted to the deceased, and by him signed in ink. It was proved that there was an agreement for a partition bearing date the 31st May, 1834, and that there was a deed of partition executed bearing date the 6th Nov. 1834, which were the dates of papers produced by the accused, the first alleged

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to be instructions for his will, the second the will itself, as above mentioned. Evidence was given by engravers to shew that the produced testamentary papers were written on paper from which pencil marks had been obliterated, and that traces of names and lines could be discovered indicating that they had been papers relating to the partition mentioned. Contradictory evidence was given as to the fact whether the accused had been at the house of the testator on the 7th of May, 1837, and it appeared that the testator did not leave his house on that day. Contradictory evidence was given also on the question whether *John Williams*, who was one of the alleged attesting witnesses, could write. There were many other facts proved with a view of raising or impugning a presumption of the guilt of the accused. It was proved on behalf of the plaintiff that his solicitor acted under the advice of counsel in the conduct of the prosecution against *Williams* and the alleged attesting witnesses.

“ And the counsel for the defendant having closed his case, the Lord Chief Justice directed the jury that the question for them to consider was whether the defendant had acted maliciously and with reasonable or probable cause; that, as to the malice, that term did not imply personal ill will; that, if the defendant had acted from any indirect motive, this was sufficient proof of malice; that, as to the probable cause, malice without probable cause would be insufficient, because frequently justice was set in motion by interested parties; that the action therefore could not succeed, unless there were absence of probable cause. And his lordship thereupon proceeded to sum up the evidence. And his lordship having summed up the evidence further directed the jury that, if they thought there was reasonable and probable cause for taking these steps against the young woman, their verdict must be for the defendant; that they were to take a dispassionate view of the state of *Mr. Barton Panton's* mind on the 12th February, 1838; that, if they thought there was a strong impression against *Mr. Thomas Williams* and against any one who was con-

cerned with him, then that was reasonable and probable cause; that if, on the other hand, they should think there was no reasonable or probable cause, then they must trace his motive to some other matter, and consider whether the importance he might attach to convicting *Mr. Thomas Williams*, and his anxiety to place him in an unfavourable position in Newgate, actuated him, if so they must find for the plaintiff.

“ And the Lord Chief Justice further stated to the jury, that, as to the advice of counsel, if there was no reasonable or probable cause, his lordship thought that the consulting counsel did not vary it; that it appeared to his lordship that it was not a question of law in a case of this sort whether there was reasonable or probable cause, but that it was altogether a question of fact for the jury, and that he should act wrong if he were to take the question from their consideration; that it also seemed clear to his lordship that the question was not as against *Thomas Williams* alone, but whether there was probable cause as against the plaintiff; that one circumstance had been observed, that is, that the former wills had been properly prepared, that that did not appear to his lordship very strong, but that they were to consider it.


“ Whereupon the counsel learned in the law for the said defendant did then and there except to the aforesaid opinion and direction of the Lord Chief Justice, and did insist that his lordship was bound to direct the jury that if there was probable cause as against *Thomas Williams* there was so as against the plaintiff.

“ And further, that his lordship was bound to state to the jury what facts, if proved, would amount to probable cause, leaving to them only the question whether they believed the evidence adduced in order to prove such facts.

“ And further, that his lordship was bound to direct the jury that the following facts, if they or any of them were proved, constituted, and each of them constituted probable cause, that is to say,

“ First, the existence of the obliterated pencil marks

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under the ink writing, unless placed there by defendant, or with his knowledge, authority, consent or connivance.

"Secondly, the fact that the defendant had reason to believe that *Thomas Williams* was not at Plasgwym on the 7th of May, 1837.

"Thirdly, the delivery of the will and codicils on the 12th of May, 1837, to the said defendant by *Jones Panton*, and his conduct and expressions thereupon.

"Fourthly, the fact that the defendant had reason to believe that the said *John Williams* could not write.

"Fifthly, the fact that the former wills and codicils of the said *Jones Panton* had been all regularly prepared.

"Sixthly, the fact that great part of the property, contained in the will asserted to be forged, was at the time at which it purports to have been executed already disposed of.

"Seventhly, the fact that *Thomas* did not communicate the existence of any will in his favour till long after the death of *Jones Panton* the elder.

"And the counsel for the defendant further excepted and objected that the Lord Chief Justice ought not to leave the question whether there was or was not probable cause for the prosecution to the jury as a question for them, and without telling them what would be probable cause."

Kelly for the plaintiff in error (*a*) stated the facts of the case as they appeared in evidence. The question is whether the judges were bound to state to the jury, as a direction in point of law, that certain facts, if proved, amounted to probable cause.

On this question it is submitted that, whether the facts, of which evidence was offered by the defendant, did or did not amount to probable cause, was a question of law, not of fact; and one on which the judge was bound to state his opinion to the jury. *Sutton v. Johnstone* (*b*) is the case

(*a*) This case was argued Tuesday February 8, before *Tindal C. J.*, *Bosanquet*, *Coltman* and *Maule* Justices, and Lord *Abinger C. B.*,

Parke, *Alderson*, and *Rolfe* Barons.

(*b*) 1 T. R. 493.

usually referred to on this point, but it is a mistake to suppose that the law was not settled previously to that decision, and the matter will be rendered clearer by observing its progress.

The action on the case for a malicious prosecution originated in the old writ of conspiracy, an account of which and of the mode in which the present action originated from it, will be found in the notes to *Skinner v. Gunton* (a). When this action was first introduced no doubt seems to have been entertained but that the question of probable cause was one of law, for the facts on which the defendant relied as amounting to probable cause were (both in the action of conspiracy, and in the action on the case derived from it) usually pleaded specially, and, though it was on several occasions objected that this plea amounted to the general issue, yet the Court held it good, upon the ground that the question of probable cause was peculiarly for the consideration of the Court. See *Coxe v. Wirrall* (b) in which the facts were specially pleaded, and the plea held good on demurrer—*Pain v. Rochester* (c) where a plea of the grounds of suspicion was held not to be bad for amounting to the general issue, “*pur doubt del lay gens*”—*Chambers v. Taylor* (d) where the same point was determined, and see *Weal v. Wells* (e).

It is obvious that at this period probable cause was considered a pure question of law, inasmuch as mere evidence is not pleadable.

Shortly after the above decisions, the practice of pleading the ground of prosecution specially fell into disuse, probably on account of the danger of a variance in so long a plea, and from the technical difficulties in framing it.

However, though it became usual to give probable cause in evidence under not guilty, instead of placing the facts constituting it on the record, the question still continued

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(a) 1 Wms. Saunders, 230.

(d) Cro. Eliz. 900.

(b) Cro. Jac. 193.

(e) 3 Bulst. 284.

(c) Cro. Eliz. 871.

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to be and to be treated by the Courts as one of law. Thus in *Golding v. Crowle* (a) the plaintiff in an action for malicious prosecution having obtained a verdict, the Court set it aside on the report of the judge that there was a probable cause, *not as a verdict against evidence, but as a verdict against law*. To the same effect are *Jones v. Gwynn* (b), *Reynolds v. Kennedy* (c), and *Candell v. London* (d). In the last case Buller J. told the jury "that there were two questions to be determined: first, whether the facts in evidence were true; 2ndly, whether, if true, they shewed a want of reasonable and probable cause," and added, "what is reasonable or probable cause is matter of law," and then gave his opinion upon the case.

In *Sutton v. Johnstone* (e) it was again expressly so laid down. That case is a peculiarly strong one, because the charge complained of was before a court-martial, with the proceedings before which the judges could not be expected to be so conversant as with proceedings in a criminal Court. However at page 545 it is again laid down by the two Chief Justices that "the question of probable cause is a mixed question of law and fact. Whether the circumstances alleged to shew it probable or not probable are true and existed, is a matter of fact, but whether, supposing them true, they amount to a probable cause is matter of law." And in that case the judgment of the Exchequer Chamber was reversed, upon the ground that probable cause did, as *a matter of law*, appear on the record, although the jury had, upon not guilty pleaded, found for the plaintiff and thereby negatived its existence in *point of fact*.

Johnstone v. Sutton (f) seems to have been considered as establishing the rule of law. In the note, by Sir John Campbell, to *Purcell v. Macnamara* (g), which is cited not as authority but to shew what the opinion of the profession

(a) Sayers R. 1; B. N. P. 14.

(b) 10 Mod. 214.

(c) 1 Wilson, 232.

(d) Cited 1 T. R. 520.

(e) 1 T. R. 493, 501.

(f) 1 T. R. 493.

(g) 1 Camp. 199.

was at that time (1812), it is expressly laid down on the authority of *Smith v. Mac Donald* (a), *Sutton v. Johnstone* and *Golding v. Crowle* that *probable cause is a question of law*.

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Davis v. Hardy (b) is an express decision to the same effect. In that case the plaintiff's witnesses having made out a *prima facie* case of want of probable cause, and the defendant's witnesses having added a circumstance, which, in the judge's opinion, altered the effect of the evidence previously given, the judge, as there was no ground for imputing perjury to the last mentioned witnesses, took upon himself to pronounce *that there was probable cause*, and to nonsuit, and the Court held that he had done right.


To the same effect precisely is *Blachford v. Dod* (c), Lord *Tenterden's* expressions at page 184 are "I have considered the correct rule to be this—If there be any fact in dispute between the parties, the judge should leave that question to the jury, telling them, if they should find one way as to that fact, then in his opinion there was no probable cause, and their verdict should be for the plaintiff. If they should find in the other, then there was, and their verdict should be for the defendant."

In *Willans v. Taylor* (d) the same rule is clearly laid down by each of the judges, by *Tindal C. J.* at page 186, 187, by *Park J.* at page 188 in the very words of *Sutton v. Johnstone*, by *Borough J.* at page 189.

In *Taylor v. Willans* (e) (the last mentioned case in error), the same rule is approved of in the judgments of the respective judges.

In *Venafra v. Johnson* (f) the same rule is substantially acted upon. It is true that in that case the judge having

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| (a) 3 Esp. 7. | (d) 6 Bing. 183; S. C. 3 M. & P. 350. |
| (b) 6 B. & C. 225; S. C. 9 D. & R. 380. | (e) 2 B. & Ad. 845. |
| (c) 2 B. & Ad. 179. | (f) 10 Bing. 301; S. C. 3 M. & Scott, 847. |

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nonsuited, as in *Blachford v. Dod* and *Davis v. Harding*, the Court granted a new trial, but this was done upon the ground that there was a controverted fact, on which the opinion of the jury ought to have been taken, before the true state of facts in the case could be ascertained.

Musgrove v. Newell(a) is no authority for the defendant. In that case the judge thought that the facts proved constituted probable cause, but that a fact subsequently proved did away with it; the Court agreed with him in the former view, but not in the latter, and granted a new trial.

Ravenga v. Mac Intosh (b), *Davis v. Russell* (c), *Broad v. Ham* (d) *Venafra v. Johnson* (e) will probably be cited for the defendant in error, but they may be all explained upon the same ground, namely, that in each of them the *motive* of the defendant was in fact a question which it was necessary to determine before the facts of the case could be ascertained, and of course before the judge could decide the question of probable cause: subject to the decision of the jury on that controverted point the judge did in each of those cases decide it. See the commencement of the Lord Chief Justice's judgment in *Davis v. Russell*, the conclusion of the judgment of the Lord Chief Justice in *Venafra v. Johnson*, and the explanation of those cases given by the Court of Exchequer in *Musgrove v. Newell*.

The case most directly adverse to the plaintiff in error seems to be *Macdonald v. Rooke* (f); that case is very loosely reported in *Bingham*, and the judge's direction, on which the case of course depended, is altogether omitted.

James v. Phelps (g) is no doubt an authority against the plaintiff in error, unless it can be distinguished in the same way as *Broad v. Ham*, by the circumstance, that the motive of the defendant was the only controverted fact in the case, and that it was that only which the Court of

(a) 1 Mee. & W. 582.

(b) 2 B. & C. 693; S. C. 4 M. & R. 187.

(c) 5 Bing. 354; S. C. 2 M. & P. 590.

(d) 5 Bing. N. C. 722; S. C. 8 Scott, 40.

(e) 10 Bing. 301; S. C. 3 M. & S. 847.

(f) 2 Bing. N. C. 217.

(g) 3 P. & D. 231.

Queen's Bench thought should have been left to the jury. The whole question of law appears to arise from a mere accident, namely, the sweeping nature of the general issue in *case*. For in trespass, in which the grounds of justification *must* be pleaded specially, it never was possible to leave their sufficiency in point of law to the jury (a). See the instances cited *arguendo* in *Weal v. Wells*. (b) Nor is it sufficient to aver grounds of suspicion in *general* terms, but the facts must be set out specially, in order that the Court may judge of them; *Moore v. Kaye* (c).

Secondly. With regard to the question whether the evidence given was capable of being stated to the jury as probable cause, if believed, there cannot be any serious contest upon this part of the case.

It must be admitted that if the wills were forged, or if Mr. Barton Panton had probable cause for believing them to have been forged, he had ground for believing that the plaintiff, who had attested them, who was a servant under Thomas Williams's control, and who had been examined in support of them, participated in the forgery.

It has been sometimes laid down that it is not enough, for the purpose of establishing probable cause, to shew circumstances tending to prove guilt, but that it must be likewise shewn that the defendant knew those circumstances, otherwise there was no probable cause *as to him*. This may be true, where the case is one of mere *suspicion*, but when the evidence proves *guilt*, that cannot be the rule; a man whose guilt is manifest cannot complain that he has been prosecuted. The action is one on the case for consequential damage. He has not been damnified. A master who turns off his servant and assigns an insufficient cause may avail himself of a sufficient one, if he afterwards discover it; *Baillie v. Kell* (d).

[He then commented on the circumstances, urging as

(a) See Year Book, 7 Hen. 4, fo. 35. pl. 3.

(b) 3 Bulst. 284.

(c) 4 Taunt. 34.

(d) 4 Bing. N.C. 1650; S. C. 6 Scott, 379.

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stated in the bill of exceptions, that they constituted probable cause for the prosecution of the defendant.]

Jervis contra. It cannot be denied that in many cases the question, whether certain facts amount to reasonable and probable cause, is purely one of law for the judge. It is equally incontestable that in many and indeed the majority of cases it is impossible to decide that question without the assistance of a jury, and that it not only may, but must be submitted to them, whether certain alleged facts are true or not, whether the prosecutor in instituting such charge knew of those facts, and whether knowing them he believed in the charge made, and to the truth of which such facts might appear to point. This was a case in which the plaintiff had obviously a strong interest in instituting the prosecution, and, even though the facts alleged might be true, yet he might believe and know that the accusation of forgery was totally without foundation. If therefore the *prima facie* case of facts of probable cause was qualified and destroyed by other facts and circumstances known to the plaintiff when he preferred the charge, he had not reasonable or probable cause for so doing, and it was impossible for the judge to decide that. There is nothing in reported cases militating against this doctrine. It is true, as said in *Johnstone v. Sutton* (a), "that from the most express malice, want of probable cause cannot be inferred," but it may be, as it was in this case, for the jury, to say, whether the plaintiff was wholly instigated by malice, that is legal malice, which an indirect motive, such as self-interest, would be, to procure a conviction, or whether he was also depending upon facts within his knowledge, and when he made the charge then really believed it. In *Ravenga v. Macintosh* (b) there was no doubt that the defendant had taken the opinion of counsel before arresting the plaintiff, but it was left to the jury to say whether

(a) 1 T. R. 545.

(b) 2 B. & C. 696 ; S. C. 4 M. & R. 187.

in arresting the plaintiff he acted bona fide, or did not believe that he had no cause of action whatever. In *Delegal v. Highley* (a), where certain facts were specially pleaded as reasonable and probable cause, Tindal C. J. in delivering the judgment of the Court that the plea was bad, said "The gravamen of the declaration is, that the defendant laid the accusation without any reasonable or probable cause operating on his mind at the time," and further "that the plea was bad, for not alleging, as a ground of defence, that which is so important in proof under the plea of not guilty,—viz. that the knowledge of certain facts and circumstances, which were sufficient to make him or any reasonable person believe the truth of the charge which he instituted before the magistrate, existed in his mind at the time the charge was laid, and was the reason and inducement for his putting the law in motion." *Broad v. Ham* (b) strongly supports the same view. In *James v. Phelps* (c), where the judge at Nisi Prius took upon himself the decision of the question of probable cause, the Court of Queen's Bench granted a new trial. That case also shews the qualification with which the authority of *Davis v. Hardy* (d) and *Blachford v. Dod* (e) is to be taken, viz. that they are inapplicable when the facts are not simple and undisputed. And it is obvious that such ought to be the law. When the facts are complicated there may be different facts bearing upon, and qualifying each other; some of these taken alone might be sufficient to warrant the prosecution, but how can the judge determine the precise disturbing force of each fact, determining also conditionally the effect of each circumstance according to the finding of the jury in favour of the one side or the other who are contesting the truth of the alleged fact. Whatever the older authorities may be, the modern clearly are that

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(a) 3 Bing. N. C. 958; S. C.
5 Scott, 154.

(b) 5 Bing. N. C. 722; S. C.
8 Scott 40.

(c) 3 P. & D. 231.

(d) 6 B. & C. 225; S. C. 9 D. &
R. 380.

(e) 2 B. & Ad. 179.

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the knowledge and belief of the facts constituting the charge are material to be considered, and they are certainly for the consideration of the jury.

In *Cox v. Wirrall*(a) the declaration charged that the defendant falso et malitiose procured the plaintiff to be indicted for a rape. The defendant pleaded that his daughter had complained to him that she had been ravished by the plaintiff, that he made his complaint to a justice, who caused the plaintiff to be brought before him, and bound over the defendant to prosecute, which he did, when the plaintiff was acquitted. The Court held the plea good "all this matter being confessed by demurrer," but they added "if it had been alleged that there was not any ravishment, and that the defendant knew so much, it might peradventure have been otherwise." In *Dubois v. Keats*(b), where also the defendant had been bound over to prosecute, it was held that that was no excuse for preferring the indictment, if he made the original charge without sufficient cause. In *Nicholson v. Coghill*(c), the fact, relied on to shew want of probable cause, was that the defendant discontinued the action in which he had arrested the plaintiff, and it was held that it was proper to submit it to the jury, to say whether it warranted that inference.

The ruling of the judge in *Macdonald v. Rooke* (d) is directly in support of the defendant's argument. "There are some cases," said Tindal C. J. "no doubt, in which a judge may be expected to tell the jury whether or not the defendant had probable cause for proceeding against the plaintiff—as in the construction of a threatening letter, or the like, but where the probable cause consists partly of matter of fact and partly of matter of law a judge would be warranted in leaving the question to the jury. This

(a) It was objected that the defendant "was too credulous to cause one to be indicted upon the complaint of so small a girl. And Croke J. was of that opinion." Cro. Jac. 193.

(b) 3 P. & D. 300.

(c) 4 B. & C. 21; 6 D. & R. 12.

(d) 2 Bing. N. C. 219; S. C. 3 M. & S. 847.

comes within the class of cases in which the question of reasonable and probable cause appears to have depended on a chain of facts connected with the plaintiff leaving her place and removing the property in question, it was a mixed question of law and fact, which might properly be left to the jury."


[He commented on the particular facts of this case, to shew the impossibility of the judge taking upon himself to determine the question in it.]

Cur. adv. vult.

TINDAL C. J. delivered the judgment of the Court.—*Ann Williams*, the plaintiff below, brought her action on the case in the Court of Queen's Bench against *Panton*, the defendant below, complaining that he had falsely and maliciously, and without any reasonable or probable cause whatsoever, procured her to be indicted for the crime of forgery. The defendant below pleaded the general issue not guilty; and upon the trial before the Lord Chief Justice of that Court, after summing up the evidence, he directed the jury, amongst other things, that, if they thought there was reasonable and probable cause for taking the steps against the plaintiff below, their verdict must be for the defendant, and also, that it appeared to him that it was not a question of law in a case of that sort, whether there was reasonable and probable cause, but that it was altogether a question of fact for the jury—that he should act wrong, if he were to take the question from their consideration.

To this direction the counsel for the defendant below excepted, and insisted "that his lordship was bound to state to the jury what facts, if proved, would amount to probable cause, leaving to them only the question, whether they believed the evidence adduced in order to prove such facts," and the counsel then proceeded to state in his bill of exceptions certain particular facts, which had been proved at the trial, insisting "that all which facts together, and each of which separately, would constitute probable cause;"

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and the counsel further excepted and objected, "that the judge ought not to leave the question, whether there was or was not probable cause for the prosecution, to the jury, as a question for them, without telling them what would be probable cause."

Upon this bill of exceptions we take the broad question between the parties to be this, whether in a case in which the question of reasonable and probable cause depends not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge; and we are all of opinion that it is the duty of the judge so to do.


In the more simple cases, where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed from the time of the earliest authorities but that such question is purely a question of law, to be decided by the judge. In *Cox v. Wirrall* (a), and in *Pain v. Rochester and another* (b), each of which was an action on the case for falsely and maliciously procuring the plaintiff to be indicted for felony, the defendant in each action set forth in the plea the facts and circumstances that induced him to indict; and, the plaintiff having in each instance demurred, it was the Court which had to determine, as a matter of law, and not the jury, as a matter of fact, whether the statement in the plea did or did not form a sufficient excuse. And in the case last referred to the very distinction now under consideration was laid down by the Court, upon the objection then taken, that the plea amounted to the general issue only, the Court holding it to be a good plea "per doubt del lay gents, for

(a) Cro. Jac. 193.

(b) Cro. Eliz. 871.

that the defendant confessed the procurement of the indictment, but avoided it *by matter in law*." And although the practice which then obtained has been altered for a great length of time, by introducing into the declaration not only the statement that the charge was false and malicious, but also that it was made without reasonable or probable cause, and thereby compelling the plaintiff to give some evidence thereof, and enabling the defendant to prove his case under the plea of not guilty, yet the rule of law that this question belongs to the judge only, and not to the jury, is not by such alteration in pleading in any way impaired. And, still further, the authorities collected in the case of *Johnstone v. Sutton*(a), and the authority of that case itself, and also the decision of *Buller J.* there cited, prove incontestably that it is a question for the jury, whether the facts brought forward in evidence be true or not, but that what is reasonable or probable cause is matter of law.

There have been some cases in the later books, which appear at first sight to have somewhat relaxed the application of that rule, by seeming to leave more than the mere question of the facts proved to the jury, but upon further examination it will be found that, although there has been an apparent, there has been no real departure, from the rule. Thus, in some cases, the reasonableness and probability of the ground for prosecution has depended not merely upon the proof of certain facts, but upon the question whether other facts, which furnished an answer to the prosecution, were known to the defendant at the time it was instituted. Again, in other cases, the question has turned upon the inquiry, whether the facts stated to the defendant at the time, and which formed the ground of the prosecution, were believed by him or not; in other cases the inquiry has been, whether from the conduct of the defendant himself the jury will infer that he was conscious he had no reasonable or probable cause; but in these and many other cases which might be suggested it is obvious that the knowledge, the

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(a) 1 T. R. 519.

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belief, and the conduct of the defendant, are really so many additional facts for the consideration of the jury, so that in effect nothing is left to the jury but the truth of the facts proved, and the justice of the inferences to be drawn from such facts, both which investigations fall within the legitimate province of the jury, whilst at the same time they have received the law from the judge, that, according as they find the facts proved or not proved, and the inferences warranted or not, there was reasonable and probable ground for the prosecution or the reverse. And such being the rule of law, where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case, to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts and inferences from facts are made out to their satisfaction, but it is equally certain that the task is not impracticable, and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view, without having recourse to the less important circumstances that have been brought before them.

Upon the whole, as the question both of law and of fact was left in this case entirely to the jury; we think the exception must be allowed, and that there must be a

G.

Venire de novo.

Kelly, before the above case was argued, moved to set aside the joinder in error, on the ground that the defendant in error, at the time of joinder, was under coverture, and had pleaded by attorney. He moved upon an affidavit, stating that the plaintiff in error had been furnished by the agents of the defendant in error, with a copy of a scire facias, bearing teste the 1st May, 1840. This copy was annexed to the affidavit, and recited that, after the judgment recovered in the Court below, and before execution, to wit,

on the 14th August, 1839, the defendant in error intermarried with *Thomas Williams*, and prayed execution on behalf of the said *Thomas Williams* and the defendant in error. *Kelly* stated that the exact period of the marriage had not been ascertained, but that it was after error brought, so that the writ of error was good, and the objection was to the joinder only, and cited *Oulds v. Sansom* (a), to shew that effect must be given to the objection in whatever form it came before the Court. *Jervis*, contra, stated that the writ of error had not been sued out until October, 1840, which was after the marriage, for though the date of the marriage in the scire facias was laid under a *videlicet*, as being August, 1839, still the scire facias itself bearing teste May, 1840, which recited the marriage, having been sued out before the writ of error, was conclusive that the objection to the joinder applied equally to the writ of error itself, and he cited *Lord Sutherland v. —* (b) to shew that the plaintiff in error should proceed by *audita querelâ*. The Court consisting of *Tindal C. J.*, *Lord Abinger C. B.*, *Parke B.*, *Bosanquet J.*, *Alderson B.*, *Coltman* and *Maule Js.*, and *Rolfe B.*, refused to interfere.

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(a) 3 Taunt. 261.

(b) Bunb. 282.

D.

CHAPMAN v. LANE.

Monday,
June 14th.

ERROR from the judgment of the Court of Queen's Bench, in an action on the case against the Marshal, for the escape of one *Newton*, a prisoner in execution.

On demurrer to a plea that the judgment in the action was signed upon a cognovit given by *Newton* in an action by the indorsee of the payee of a bill drawn by *Newton*, to secure money lost at play, the Court of Queen's Bench gave judgment for the plaintiff below (c).

(c) 3 P. & D. 668.

In an action against the marshal, for the escape of a prisoner in custody under an execution on a judgment obtained adversely against him, it is no defence that the judgment was to recover the amount of

a bill of exchange, given for money lost at play, the statutes 10 Car. 2 and 9 Ann. not including judgments obtained adversely, but those only given to secure money lost at play.

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Sir *J. Campbell* A. G. appeared for the plaintiff in error (a). It appears on this record that *Newton* was not lawfully in custody, and therefore this action cannot be maintained. The argument in support of the judgment rests on two grounds; first, that it is not competent in an action for an escape to inquire into the validity of the judgment; and, secondly, that the words "all judgments," in the 16 *Car. 2*, c. 7, s. 3(b), do not mean judgments obtained after entering into the prohibited contract, but those only voluntarily given as a security.

It cannot be disputed that by the stat. 16 *Car. 2*, which in this respect is not enlarged in its operation by the late statutes, the note mentioned in these pleadings was altogether void, whether in the hands of a party to the gaming or of an innocent indorsee (c): *Hitchcock v. Way* (d). [*Alder-*

(a) Before *Tindal* C. J., *Erskine* and *Maule* Js., *Parke*, *Alderson* and *Rolfe* Bs. He urged the argument already reported in the court below, and which it is therefore unnecessary here to repeat at length.

(b) Which declares that "the contract or contracts for the same, and for every part thereof, and all and singular the judgments, statutes, recognisances, mortgages, conveyances, assurances, bonds, bills, specialties, promises, covenants, agreements, and other acts, deeds and securities whatsoever, which shall be obtained, made, given, acknowledged or entered into, for security or satisfaction of and for the same or any part thereof, shall be utterly void and of none effect."

By 9 *Ann. c. 14*, s. 1, "All notes, bills, bonds, judgments, mortgages, or other securities or conveyances whatsoever, given, granted, drawn, or entered into, or executed, by any person or persons whatsoever, where the whole or any part of the consideration of such convey-

ances or securities shall be for any money or other valuable thing whatsoever, won by gaming at cards, dice tables, tennis, bowls, or other game or games whatsoever, or by betting on the sides or hands of such as do game at any of the games aforesaid, or for the reimbursing or repayment of any money knowingly lent or advanced for such gaming or betting as aforesaid, or lent or advanced at the time and place of such play, to any person or persons so gaming or betting as aforesaid, or that shall, during such play, so play or bet, shall be utterly void, frustrate and of none effect, to all intents and purposes whatsoever, any statute, law or usage to the contrary thereof in anywise notwithstanding."

(c) The judgment against *Newton* was obtained before the passing of the stat. 5 & 6 *Will. 4*, c. 41. See the plea, 3 P. & D. 669.

(d) 6 A. & E. 943; S.C. 2 N. & P. 72.

son B. Then you must say that the question tried in the action against the original defendant may be tried over again in an action for the escape.] The Marshal may shew that the transaction in respect of which it is sought to make him liable, was one altogether prohibited by the legislature. [Parke B. In this case the cognovit was given in an adverse action. The original defendant might have availed himself of the illegality, but he let slip the opportunity of setting up that defence.]

Then this judgment is made void by the express enactment of the stat. 16 *Car. 2*, c.16, s.3, that "all judgments" given for money lost at play shall be void. [Parke B. The words "other securities" shew what is meant by the words which precede it.] The plain grammatical construction must be abided by, unless it would lead to some absurdity or defeat the manifest intention of the legislature.

Knowles contra was stopped.

TINDAL C. J.—We are of opinion that the judgment of the Court of Queen's Bench must be affirmed. The question depends on the construction which ought to be put on the stats. 10 *Car. 2* and 9 *Ann.* Then, distributing the words in those enactments, "notes, bills, bonds, judgments," it is clear that they do not include judgments obtained adversely, but those only given to secure money won by gaming. It cannot be supposed that it was intended to give a double defence, first, in the action on the bill, and afterwards in an action founded on the judgment; or that the defendant might lie by in the first action, and take advantage of the illegality when judgment had been obtained against him. If the defendant cannot take this advantage, it is clear that a third person, charged as a wrongdoer, cannot.

G.

Judgment affirmed.

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Tuesday,
June 15th.

ROBINSON and another v. REYNOLDS, Public Registered
Officer of the National Bank of Ireland.

To a declaration by the indorsee of a bill of exchange, drawn by *K.* and accepted by the defendants, they pleaded that *K.* was a trader in Ireland, accustomed to consign goods to them by carrier, as his commission agents at Liverpool, and that the usual course of business was as follows:—*K.* on consigning goods from time to time, took a receipt bill of lading for the goods signed by the carrier, and obtained advances of money from the plaintiff, on indorsing to him the bill of lading, and

ERROR from the Queen's Bench, on judgment given by that Court for the plaintiff below, non obstante veredicto (a).

The pleadings in the Court below were as follows:—
Reynolds, &c. v. Robinson and another. Assumpsit by the plaintiff as indorsee of a bill of exchange, drawn by one *Patrick Keegan*, on the 7th February, for 200*l.* and accepted by the defendants.

Plea: that long before and at the time of the making of the said bill of exchange, and thenceforth until and at the time of the accepting of the said bill of exchange by the said defendants, *Keegan* carried on trade and business in Ireland, and in the course of such trade and business was, during all the time aforesaid, used and accustomed from time to time to deliver in Ireland to certain carriers, to wit, a certain company, called the City of Dublin Steam Company, divers goods and merchandizes, to be carried and conveyed for him by the said company, in and by certain vessels, to Liverpool, in the county of Lancaster, consigned and delivered at Liverpool to his order, and upon so delivering such goods as aforesaid to the said company, to be carried and delivered as aforesaid, *Keegan* during all the said time was used and accustomed to take and receive of

(a) See the case of *Reynolds v. Robinson*, 3 P. & D. 611.

also a bill of exchange, drawn by *K.* upon the defendants, for the amount of such goods; the plaintiff then remitted the bill of exchange to the defendants for acceptance, and also the bill of lading, indorsed by himself, and thereupon the defendants, on the faith of the bill of lading, and in consideration of such security on the goods, were accustomed to accept such bill of exchange. That at the time of the drawing and indorsing by *K.* to the plaintiff, of the bill of exchange in question, *K.* indorsed to the plaintiff a bill of lading, the carrier's signature to which was forged, well knowing the same &c., and on the faith thereof obtained the usual advance, to wit, the amount of the bill of exchange; that the defendants, on the remittance to them by the plaintiff of the forged bill of lading, indorsed by him, and of the bill of exchange, accepted the latter, at his request, without notice &c., and so the consideration for their acceptance wholly failed.

Held, that as the plaintiff was indorsee of the bill of exchange for value, and it was not averred that he obtained the acceptance by any fraudulent representation, or that he knew the bill of lading to be forged, the failure of consideration between *K.* and the defendants was no defence, and that the plaintiff was entitled to judgment non obstante veredicto.

and from the said company a carrier's receipt bill of lading or document, similar to and corresponding with the one hereafter set out, of and for such goods and merchandizes, signed by the agent of the said company, the same being by the usage and custom of merchants a negotiable instrument, by the indorsement whereof for value the property of and in the goods and merchandizes mentioned therein passes to the indorsee, and by virtue of the possession of which, so indorsed for value, the indorsee thereof for value can obtain the possession and delivery to him by the said carriers of such goods and merchandizes. And *Keegan*, upon having so delivered such goods and merchandizes, and so taken and received such receipt bill of lading or document, was during all the time aforesaid used and accustomed to obtain, and did from time to time obtain advances from the said National Bank of Ireland, on delivering to the said National Bank of Ireland such receipt bill of lading or document as aforesaid, of and for such goods and merchandize, so signed by the agent for the said City of Dublin Steam Company as aforesaid, and indorsed by him, *Keegan*, to the said National Bank, and on his, *Keegan's*, drawing and delivering to the said bank a bill of exchange on the defendants, who during all the time aforesaid carried on trade and business in Liverpool, as purchasers of and commission agents for the sale of such goods and merchandizes as *Keegan* was in the habit of so delivering to the said company for the purposes aforesaid, if he intended such goods to be delivered to them the defendants at Liverpool, or on some other person or persons carrying on such trade and business and dealing as last aforesaid at Liverpool, to whom he intended such goods to be delivered at Liverpool. And the said National Bank was, during all the time aforesaid, used and accustomed to make, and did from time to time make, such advances as aforesaid, upon the deposit with them of such receipt bill of lading or document so indorsed, and the drawing and delivering to them of such bill of exchange as aforesaid, and were, during all the time aforesaid,

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used and accustomed upon receipt of such bill of exchange, and such receipt bill of lading or document, so as aforesaid, to send and transmit to Liverpool such receipt bill of lading or document, indorsed by them the National Bank, together with such bill of exchange, and to cause the same to be produced and presented to the defendants, or to such other person or persons as aforesaid, and thereupon and on production of such receipt bill of lading or document, so indorsed as aforesaid, by the said bank, and on the faith thereof, and at the request of the said bank, and in consideration of such security on such goods and merchandize, so delivered to the said company as aforesaid, the defendants, or such other person or persons as aforesaid, respectively used and were accustomed to accept such bill of exchange as aforesaid; of all which several premises the National Bank of Ireland, to wit, &c. had notice, and then well knew the same. The defendants further say, that at the time of the drawing and indorsing of the said bill of exchange by *Keegan*, and of the delivery of such bill of exchange by *Keegan* to the National Bank, and before the acceptance of the same by the defendants, *Keegan* pretending and assuming to act according to and in pursuance of the said course of trade, and the said mode of obtaining such advances as aforesaid, and under colour thereof, fraudulently delivered to the National Bank a certain forged and counterfeit receipt bill of lading or document, in the words and figures following (that is to say). The declaration then set out a bill of lading for sixty firkins of butter, signed by *J. Mitchell*, as agent for the Dublin Steam Navigation Company.

And *Keegan* then, to wit, at the time of his so drawing, indorsing and delivering the said bill of exchange, falsely and fraudulently pretended to the said National Bank that such receipt bill of lading or document was a true document, signed by one *J. Mitchell* for the said company, and that the said goods and merchandize therein mentioned had been delivered to the said company, and had been received

by them, as in the said forged and counterfeit receipt bill of lading or document in that behalf mentioned; whereas in truth and fact no such goods or merchandize were nor was any part thereof ever delivered or received, and the said receipt bill of lading or document was and is forged and counterfeit, and never was signed by the said *J. Mitchell*, or by any one authorised to sign the same for the company, or otherwise howsoever, and was utterly void and of no use, value or effect whatever, all which premises *Keegan* then well knew. And *Keegan* well knowing the premises, to wit, on &c., indorsed and delivered to the National Bank the said receipt bill of lading or document, and the said bill of exchange, which he then, and before the said acceptance thereof, indorsed. And the National Bank thereupon, to wit, on &c., and by reason of such delivery and deposit as aforesaid, advanced a large sum, to wit, the said amount of the said bill of exchange to *Keegan*, on the faith of such forged and counterfeit receipt bill of lading or document. And afterwards, to wit, on &c., the National Bank then indorsed the said forged and counterfeit receipt bill of lading or document, and sent and transmitted the same so indorsed by them, together with the said bill of exchange, to Liverpool aforesaid, and produced and presented the said forged and counterfeit receipt bill of lading or document, together with the said bill of exchange, to the said defendants, and, to wit, on &c., requested the defendants to accept the said bill of exchange for them, to wit, on the faith of and in consideration of, and on the delivery over to them by the said bank of the said forged and counterfeit receipt bill of lading or document so indorsed, which they, to wit, on &c., produced and shewed to the defendants, so indorsed as aforesaid by the said bank to the defendants, as and for a true receipt bill of lading or document, signed by *J. Mitchell*, as agent of and for the said company. And the defendants, to wit, on &c., in consideration of the goods in the forged and counterfeit receipt bill of lading or document mentioned and supposed to have been delivered

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and received as stated therein, and to be represented by the said receipt bill of lading or document, and confiding and relying on and in consideration of the said forged and counterfeit receipt bill of lading or document, and the said indorsements thereon, and on the faith of the same, and in ignorance of the said receipt bill of lading or document being forged or counterfeit, but supposing the same to be genuine, and without notice or knowledge of the premises in this plea mentioned, accepted the said bill of exchange in the first count mentioned for the said National Bank, and at their request, which is the same acceptance as the acceptance mentioned. And so the defendants say, that the said consideration for the acceptance which they had been induced to make upon the said bill of exchange in such ignorance as aforesaid, and under the said mistake, into which they had been led by and through the said conduct and indorsement of the National Bank as aforesaid, wholly failed, and there never was any consideration whatever, save and except as in this plea mentioned, for the said accepting of the said bill so accepted for and at the request of the said National Bank as aforesaid: wherefore the said defendant refused to pay the said bill of exchange as in the said first count mentioned, as they lawfully might for the cause aforesaid. Verification.

Replication: de injuriâ and issue thereon.

The case was argued (a) by *Cresswell* for the plaintiff, and by *Kelly* for the defendant in error. The argument did not differ in any material respect from the argument in the Court below.

Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.—The question in this case is whether the plea contains a

(a) After Hil. T. last (Feb. 8), before *Tindal C. J.*, Lord *Abinger C. B.*, *Parke B.*, *Bosanquet J.*, *Alderson B.*, *Coltman* and *Maule Js.*, and *Rolfe B.*

good answer to the plaintiff's declaration. The plaintiff sues on behalf of the National Bank of Ireland, who are indorsees of a bill of exchange drawn by one *Keegan* on and accepted by the defendant. The substance of this plea is as follows. (His lordship then stated the substance of the plea.) The replication *de injuriâ* put in issue the whole of the plea, and a verdict was found for the defendant, but the Court of Queen's Bench gave judgment *non obstante veredicto* for the insufficiency of the plea, and the question for our decision is whether that judgment was right. We are of opinion that it was.

The plea does not disclose a defence on the ground that the acceptance was obtained by means of a fraudulent representation by the bank, for though the document, on the faith of which the bill is said to have been accepted, was forged, it is not averred that the bank knew it to be so; nor, even if a warranty by the bank that the document was genuine would constitute a defence, is there any averment that such a warranty was given; the sole ground on which the defendant relies is, that the acceptance was not binding, on account of the total failure or insufficiency of the consideration for which it was given, the document, on the delivery of which the acceptance was given, having been forged, and there never having been any other consideration whatsoever for the acceptance of the defendant. And this would have been a good answer to the action if the bank had been the drawers of the bill, but the bank are indorsees and indorsees for value: and the failure or want of consideration between them and the acceptor constitutes no defence, nor would the want of consideration between the drawer and acceptor (which must be considered as included in the general averment that there was no consideration), unless they took the bill with notice of the want of consideration, which is not averred in this plea. Admitting that the bill was accepted by the drawee at the request of the bank and on a consideration which turns out to be utterly worthless, the case is the same as if the bill

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had been accepted without any value at all being given by the bank to the defendant, and on that supposition the defendant would still be liable as acceptor to the bank, who are indorsees for value, unless not only such want of consideration existed between the drawer and acceptor, but unless the indorsees had notice or knowledge thereof, for the acceptance binds the defendant conclusively as between him and every bonâ fide indorsee for value. And it matters not whether the bill was accepted before or after such an indorsement. Consistently with every averment in the plea, the bill may have been accepted on the credit of the drawer or for his accommodation, and the plaintiff would then unquestionably have a right to sue, having given full value for it.

We think therefore that the plea is defective in substance and does not contain an answer to the plaintiff's declaration.

D.

Judgment affirmed.

IN THE QUEEN'S BENCH.

FENWICK v. LAYCOCK.

Saturday
June 19th.

Where seizure by the sheriff under a fi. fa. is disputed on the ground that the goods on which the levy has been made were held by the defendant, not in his own right, but merely as executor in trust for others, the defendant is to be considered as "not being the party against whom the process issued," and the sheriff may apply for an interpleader rule under 1 & 2 Will. 4, c. 58, s. 6.

THIS was a sheriff's interpleader rule, under the 1 & 2 Will. 4, c. 58, and the question raised was, whether the defendant in the execution was under the circumstances entitled to be the claimant, and whether, such claim having been made, the sheriff could come to this Court for relief.

The ground on which the defendant resisted the seizure by the sheriff was, that the goods on which the levy was made were not his in his own right, but that he had possession of them as executor of one *Amelia Miller*, in trust for the payment of her creditors, and the maintenance and education of two of her children until they came of age, when they were to be sold and the proceeds divided between

and the sheriff may apply for an interpleader rule under 1 & 2 Will. 4, c. 58, s. 6.

them. The testatrix died in November, 1839, and the defendant had been in possession of part of the goods ever since. These goods consisted of fixtures and trade utensils, with which, and the stock found on the premises at the time of her death, he had carried on the business for the purposes of the trust, replacing the consumed stock by the proceeds of the business, and applying the residue of them as directed by the will. He had no personal interest, except that he paid himself the foreman's wages which he used to receive in the lifetime of the testatrix. The action was brought against him in his private character, and not as executor (*a*).


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Miller for the defendant (*b*). The sheriff is not entitled to a rule, under stat. 1 & 2 Will. 4, c. 58, s. 6, where the claim is made by the party against whom the process has issued. Here the defendant claims. [*Patteson J.* The 6th section was introduced for the benefit of the sheriff, in order to protect him against actions. This case is within the mischief contemplated by the statute, for, if the sheriff sells after the notice he has had, he will be liable to an action by the defendant as executor.] But there is no exception in the statute in favour of a claim by the party defendant in right of another.

Whitchurst for the execution creditor. It was not intended to relieve the sheriff in every case from liability, and a claim by the party against whom the process has issued, whether made in his own right or in right of another, as assignee, &c. is one of the excepted cases. [*Patteson J.* If the joint goods of two trustees were seized for the debt of one of them, could not the other claim and sue the sheriff?] That would not be a claim by the party defendant.

(*a*) A previous application had been made (May 26th) to *Wightman J.* at chambers, who declined to make any order.

(*b*) This case was argued Jan. 12th, before Lord Denman C. J., *Patteson, Williams and Coleridge Js.*

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No issue can be framed in this case. If the (now) defendant is made plaintiff, and proves a legal title to the goods, he thereby establishes the right of his execution creditor to seize. [*Patteson J.* We could so frame the issue as to remedy that technical difficulty.] Then as to the trust in favour of the testator's children. It may be such as a court of equity would enforce against the executor, but a court of law cannot take notice of it, *Izod v. Lamb* (a); and must treat the executor, dealing with the goods in the way of trade, as possessed of them to his own use: *Quick v. Staines* (b).

C. C. Jones for the sheriff. The legislature intended to relieve the sheriff from the risk of actions in right of third parties; the words of the statute, "persons, not being the parties, &c." were intended to exclude a claim set up by the party defendant *in his own right*, for with such claim the sheriff is left to deal in the best way he can. Here, it is true, the defendant in one sense is the party against whom the process issued, but he does not claim as such party in his own right; he claims as the representative of third persons, whose goods are not liable, but to whom the sheriff will be liable if he sells. In framing the issue, the executor will be the plaintiff, suing in right of those persons against the execution creditor. The words of the statute may be so construed as to embrace such a claim; and, in *Putney v. Tring* (c), the Court of Exchequer inclined strongly to the opinion that an equitable claim would entitle the sheriff to relief.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court, and (after stating the case as above) proceeded thus:—We apprehend the law upon this subject is tolerably well settled. In *Whale v. Booth*, to be found in a note to

(a) 1 Cr. & Jer. 35.

(c) 5 M. & W. 425.

(b) 1 B. & P. 293.

Farr v. Newman (a), but fully reported in 4 *Douglas*, 36, it was held that, where a sheriff seized and sold the goods of the testator, in an execution for the executor's own debt, the property passed by the sale, although the plaintiff was cognizant of the fact. But there Lord *Mansfield* said, that the executor might have disputed the seizure with the sheriff; and he puts the case, by reason of the executor's consent, on the footing of an alienation by the executor. In *Farr v. Newman* (a), this Court, Mr. J. *Buller* dissenting, held, that, where a writ, at the suit of the testator's creditor, came in before a writ at the suit of the executor's creditor had been executed, the sheriff was bound to levy under the last delivered writ, and in *Gaskell v. Marshall and another* (b), Lord *Tenterden* ruled that the administrator, who had taken possession of goods of the intestate, and used them for three months in the intestate's house, might, as administrator, maintain trespass against the sheriff for seizing, and after notice selling them under a writ for the administrator's own debt. He gave leave to move to enter a nonsuit, but his ruling was not questioned. In that case, it is true, he is reported to have said, if the plaintiff had been in possession of the goods for a very long time, it might have been otherwise; and here the possession has been long, but then it is a possession consistent with the will, and necessary to the execution of the trust reposed. It seems therefore clear that this case is within the mischief contemplated by the act of 1 & 2 *Will.* 4, c. 58, and that, as to a large portion, at least, if not all of the articles seized, the sheriff will be liable to be sued by the defendant, if the execution is persisted in.

It remains to consider whether the case is within the words of the 6th section of the act: these are "claims made to such goods and chattels by assignees of bankrupts and other persons, not being the parties against whom the process has issued," and it is objected here, on the one hand, that the defendant is the party against whom the pro-

(a) 4 T. R. 621.

(b) 1 M. & Rob. 132, and 5 C. & P. 31.

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cess has issued; while on the other it is answered that the defendant, as executor and trustee, is not the party, although he is the same person. And this last appears to us to be the reasonable interpretation of the words. The object of the act was to give protection to the sheriff whenever, by reason of claims on the property seized, he was in danger of action by the execution creditor if he yielded to the claim, or by the claimant if he executed the writ, but it did not mean to protect him where the resistance was to the writ itself, i. e. where the party in the cause objected to any execution on his own goods; for there the process itself properly executed would be his defence, the words "not being the parties against whom the process has issued," seem to have been introduced for this purpose, and they must be read as a qualification, not only on the words "other persons," but also on those which precede, namely, "assignees of bankrupts;" for, if the process were against assignees as such, they certainly, in the case of an execution upon the bankrupt's goods, would not be within the act. On the other hand, if in a suit against an individual in his own right, who happened to be also an assignee of a bankrupt, the sheriff should execute a *fi. fa.* by seizure of the bankrupt's goods, there can be no doubt that such person, whether sole assignee or conjointly with any other person, might claim the goods, and if their claim was rejected might sue the sheriff—such a case then would be within the words and the spirit of the act, and the sheriff would be entitled to relief. Yet in this case, supposing the defendant were a sole assignee, he would be as much the party against whom the process issued as the present defendant, and it would be necessary therefore to understand the word "party" not merely as synonymous with "person," but with reference to the character also in which the defendant is sued. And, if this meaning must be given where the exception applies itself to assignees of bankrupts, on all just principle it must be equally given where it applies itself to other persons; and so to hold is according to the sound rule

of construing statutes, because it adapts itself to the mischief and advances the remedy.

We think therefore the rule must be absolute; the terms may be settled by reference to a judge at chambers.

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Rule absolute.

The QUEEN v. The Chancellor, Masters and Scholars of
the University of OXFORD (a).

SIR F. POLLOCK in Hilary term last (January 20), obtained a rule calling on the Chancellor of the University of Oxford and *Thomas Bourke* to shew cause why a writ should not issue to the Chancellor's Court of the University to prohibit further proceedings against one *John Taylor*.

It appeared from the affidavit of *Taylor*, on which the rule was granted, that *Taylor* was an attorney of the Court of Queen's Bench, residing in the city of Oxford, and that on the 22nd February, 1840, he caused a writ of summons in an action of debt in the Queen's Bench, at the suit of one *Barnes* of that city, dog dealer, to be served on *Thomas Bourke*, at that time a resident undergraduate of Worcester college, within the limits of the jurisdiction of the University. The cause of action, which was the value of a dog lent on hire for the pursuit of game, arose within that jurisdiction. On the 27th, *Taylor* was served with a citation from the Chancellor's Court, at the instance of *Bourke*, to appear before the Vice-Chancellor or his assessor on the 28th, "to answer to certain articles or interrogatories to be administered and objected to him, by virtue of our office, concerning the reformation and correction of his manners and excesses, but more especially for infringing the statutes and privileges of the University, by serving or causing to be served on *Thomas Bourke*, of Worcester college, undergraduate, a writ in an action of debt at the suit of one *William Barnes*, which writ was obtained out of the Court of

Where the Chancellor's Court of the University of Oxford had proceeded against a party for contumacy, in suing a resident undergraduate in one of the superior courts of Westminster, and had issued a warrant to arrest him for not paying the costs of the proceeding, this Court made a rule absolute for a prohibition, without requiring the applicant to declare in prohibition.

(a) Decided during the term (June 7).

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Queen's Bench, contrary to the statutes in that case made and provided."

Deponent did not appear to the citation, and on the 28th February was served with the following notice:

"*Office Process v. Taylor.*

"The judgment delivered this day in the above suit is, that the defendant be required to stop all proceedings in the action of *Barnes v. Bourke*, in the Court of Queen's Bench, on or before Monday next, the 2d March, and that the said defendant do pay the costs of the promotor.

(Signed) *Philip Bliss*, Registrar."

The costs were taxed at 2*l.* 14*s.* An application for payment of them had been made to deponent by the proctor of *Bourke*, by whom the office of the judge had been promoted. *Barnes* also had been proceeded against in the same manner in the University Court, and had been arrested for non-payment of the promotor's costs; and deponent, who had refused to pay the above-mentioned costs of 2*l.* 14*s.*, himself apprehended the like course for non-payment would be taken against him, and had heard and believed that a warrant for his apprehension was in the hands of the officer of the said court for execution.

The affidavits in opposition to the rule disclosed the following facts:

Edw. 4, by letters-patent under the great seal, in the 1st year of his reign, containing an inspeximus of the charters of several of his progenitors, amongst other things, granted to the University that the Chancellor of the University and his successors, and their commissaries and deputies, &c. should or might enquire by scholars and the laity of the said town of Oxford and by others, "as well of all manner of transgressions and misprisions, as of extortion and ignorances, negligences, excesses, conspiracies, confederacies, champerties, double dealings, maintenances, false allegations, nuisances, forestallings, regratings, and all other articles which can fall in fine or ransome, or other pecuniary penalty, and other contracts, pleas and personal complaints,

and other causes and matters whatsoever, by whatsoever name they might be called, &c. (felony and mayhem, and assizes and pleas of freehold only excepted), within the said town of Oxford and the said suburbs and precincts, howsoever arising, done or perpetrated, or to be done or perpetrated, as well ex officio or at the suit of the late king or his heirs, as at the suit of the party, or in any other manner whatsoever where a master or scholar, or servants of masters and scholars, or any other person who ought to enjoy any of the privileges or liberties of the said University, whom the said Chancellor or his successors, &c. should be willing to claim as such, was or should be one of the parties, and therein might have full cognizance and correction, &c. of such like pleas, complaints, causes and things, in whatsoever place within the said town, &c., and might make execution thereof according to their laws and customs, or according to the law of the kingdom of England, at the will of the said Chancellor or his successors, &c., and all and singular matters, complaints, causes and articles of this kind, except as before excepted, might hear and determine."

Hen. 8, by letters-patent under the great seal in the 14th year of his reign, in order "to settle and put an end to all and whatsoever discords, contrivances and doubts which might in future arise between the University and the citizens of the town, that the students there might lead a more quiet life," granted "to the Chancellor and scholars, their masters and servants with their families, and all others who then were or in future should be registered in the register of the University," to enjoy all the liberties and privileges then and before granted by him, and further granted that "for any sentence or any trial justly or unjustly given, or thereafter to be given by the said Chancellor, commissary or his deputy, &c. within the precincts of the University, for or against any person or persons, which person or persons by the authority and by reason of the said privileges and liberties granted or to be granted to the said Chancellor, &c. are or is strictly bound to stand trial before the

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said Chancellor, commissary, &c. for such sentence so justly or unjustly given, and for the execution of such sentence, &c., neither the Chancellor, &c. nor any servant of the University, for or concerning the same cause, may by any writs or other mandates of the late king or his heirs or successors, or in any other manner be brought against their will out of the said University or the precincts thereof, to stand trial, nor be harassed, troubled, or anywise molested or oppressed in future before the said late king or his council, nor before any of his justices in any of his court or courts, so long as the Chancellor, &c. so unjustly acting may be ready and willing to abide by the judgment and decisions of the proctors and others deputed for that purpose according to the statutes, ordinances and customs of the University," under a penalty of 20*l.* (to be paid to the University) on any one opposing or not obeying that order. These letters-patent contained a grant (in similar words with those of the charter of *Edw. 4*) "that the Chancellor, &c. should be able to inquire by scholars or their servants, or by the laity, &c. as well of all manner of trespasses and other offences whatsoever, as also of misprisions, extortions, conspiracies, confederacies, maintenances, false allegations, accounts, contracts and injuries whatsoever, and all other articles which might fall in fine, &c. *and of all other contracts, pleas and complaints, personal and other causes and matters whatsoever*, under whatever name they might be comprised, &c. (assizes and pleas of freehold only excepted) within the town of Oxford, suburbs, hundred or counties of Oxford and Berks aforesaid, or elsewhere within the kingdom of England, &c. as well at the suit of the king as at the suit of the party, where the scholars or their servants, or ministers or any other person who ought to have any privilege of the University, whom the said Chancellor, &c. should challenge, should be one of the parties, and should have full cognizance and correction thereof, and should execute such pleas, complaints, causes and matters in any place, &c. and execution thereof have either according to their statutes

or according to the laws of England, at the will of the said Chancellor, &c. and should levy and receive all fines coming therefrom, to the use of the University for ever; so that no justice assigned to hold pleas before the king, &c. justice of assize or gaol delivery, or keepers of the peace, or justices of servants, labourers or artificers, or other justices or judges whatsoever, steward or marshal, or clerk of the market, or of the household of the said king or his heirs whatsoever, should in any sort intermeddle concerning such pleas, quarrels, contracts, articles, and causes, matters or other things, (except as before excepted) done in the said town of Oxford, the suburbs or precincts thereof, or elsewhere within the kingdom of England."

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These and all other letters-patent were confirmed by stat. 13 *Eliz.* c. 29, and declared to be as effectual as if they had been recited in that statute.

The affidavits also stated that among other statutes of the University (confirmed by letters-patent of *Car.* 1, in the 12th year of his reign), under the title "*De judiciis*," was contained a statute entitled "*De jurisdictione Universitatis tuendâ*," which was as follows :

"*Quod nullus scholaris vel persona privilegiata, de quâcunque causâ in Universitate terminabili, quempiam in curiâ aliquâ extra Universitatem (nisi ordine appellationis servato) conveniat; nec cujusquam alterius curiæ jurisdictioni ultrò se submittat; sed alibi impeditus Cancellarium vel Vice-Cancellarium, quamprimum poterit, de lite sibi intentatâ, certiozem faciat; et modis quibus poterit privilegiorum Universitatis hac in parte conservationem sollicitè curet; sub pœna quod, si quis scholaris vel persona privilegiata secùs fecerit, ut perturbator pacis incarceretur, mulctetur, et, si in contumaciâ perstiterit, privilegiis Universitatis exuatur; persona vero non privilegiata vel oppidanus, qui scholari vel personæ privilegiatæ extra Universitatem in hujusmodi causis litem intentaverit, commercii cum scholaribus et personis privilegiatis interdicto, donec satis-*

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fecerit, coerceatur. *Extraneus verò tanquam jurisdictionis Universitatis contemptor, si apprehendi poterit, incarcerationetur.*"

That by another statute, intituled "De iis qui Universitatis juribus ac privilegiis adversantur discommunicandis vel disprivilegeandis," it was ordained—

"Quoniam oppidani academicis plerumque infesti et adversi privilegia Universitatis oppugnandi nullam non occasionem captant; quin et privilegiati nonnunquam publicam utilitatem privato commodo posthabentes, privilegiis Universitatis adversantur, statutum est, quod ad compescendam hujusmodi insolentiam sive vecordiam (si qui super hoc convicti fuerint) privilegiatis, privilegiis Universitatis, oppidanis verò, commercio cum privilegiatis, interdicatur."

That by another statute under the title "De moribus confirmandis," intituled "De ludis prohibitis," it was ordained—

"Quod scholares cujuscunque conditionis abstineant ab omni lusûs genere, in quo de pecuniâ concertatur. Item quod abstineant ab omni lusûs genere vel exercitû, ex quo aliis periculum injuria vel incommodum creatur; veluti a venatione ferarum cum *canibus cujuscunque generis*, viverris, retibus, aut plagis, necnon ab omni apparatû et gestatione bombardarum et arcubalistarum."

The affidavits stated that the several proceedings against *Taylor* had been regularly taken according to the practice of the University Court, and that in all cases of Office Process or citation, where a party accused of violating the privileges of the University is convicted, and a less penalty than that of discommunication is inflicted, the defendant is ordered to pay the costs, and that in case of non-payment it is customary for the said court to decree that the defendant should be arrested. That judgment had been pronounced against *Taylor* after regular proof of his contumacy in serving upon the said *Bourke*, "an undergraduate member of and resident within the said University, a writ sued out of one of the Courts at Westminster, in a cause arising within the said University and within the jurisdiction of and deter-

minable in the said court." That after the judgment had been duly pronounced and notice of it served upon *Taylor*, and after demand of payment of the costs decreed, viz. on the 19th March, 1840, a warrant was duly issued for execution in the following terms:

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Chancellor's Court of } The Most Noble *Arthur* Duke
 the University of Oxford. } of *Wellington*, K.G. Chancellor
 of the University of Oxford. The Worshipful *John David*
Macbride, D.C.L. Assessor. To the yeoman bedels
 of the University of Oxford, our officers, ministers and
 servants in this behalf, jointly and severally, and espe-
 cially to *Thomas James*, our yeoman bedel in the faculty
 of law, or his lawful deputy exercising these presents,
 and also to the keeper of the Castle Gaol in the city of
 Oxford, greeting.

John David Macbride, } Whereas the office of the judge
 Assessor. } was, on the 27th day of February,
 A.D. 1840, promoted in this court by *Thomas Bourke*, of
 Worcester college, in the said University, undergraduate,
 against *John Taylor*, of the city of Oxford, attorney at law,
 in a business of the violation of the statutes and privileges
 of the said University, and whereas on hearing the said
 cause it was, amongst other things, decreed by the judge
 of the said court that the said *John Taylor* should forthwith
 pay the costs of the said promoter. And whereas the said
 costs have been taxed and allowed at the sum of 2*l.* 14*s.*,
 but the said *John Taylor*, on demand being made, has
 neglected to pay the said costs, now these are to authorise,
 Costs . . . 2 14 0
 Warrant 2 0 6
£4 14 6

Henry Casy,
 Proctor, require and command you, and each and
 every of you, jointly and severally, that
 you arrest and take the body of the said
John Taylor, and him safely keep in your
 or either of your custody or custodies till
 he shall have paid the said costs, together with all costs
 attending upon this warrant. And you, the keeper of the
 Castle Gaol aforesaid, are hereby authorised and required

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to take, receive and in safe custody keep the body of the said *John Taylor* until he shall be from thence discharged according to law.

This agrees with the decree of the judge.

Dated March 13th, 1840."

That an appeal by the charters and statutes of the University lies from the decrees and proceedings of the said court to the Congregation of Regent Masters, then to the Convocation of Doctors and Regent and Non-Regent Masters, and thence to the Queen's Majesty in Chancery.

In the ancient records of the University numerous instances, in the fifteenth century, are recorded, in which persons, not members of the University, were required to find sureties "de non trahendo aliquam causam terminabilem infra Universitatem ad extra."

That from an ancient book, called the Vice-Chancellor's Book, and other ancient records, &c. it appears that it has been customary for the University to take cognizance of any violation of the privileges of the University, when committed either by matriculated members of the University or by citizens of Oxford, or by other persons, from a very early date, and to punish the offenders by imprisonment or discommunication, or otherwise. That by an instrument in the said Vice-Chancellor's Book, intituled, "*Ordinatio Universitatis contra impugnantes privilegia et libertates ejusdem*," the form of sentence of discommunication is prescribed as follows :

"*Ex unanimi consensu Universitatis magistrorum ordinatum est et strictissime inhibitum ne quis de jurisdictione scholaris, vel laicus serviens, vel alius quicumque cum eis aut eorum uxoribus aut servientibus emendo vel vendendo quocunque colore communicare præsumat.*"

The affidavit then stated several instances in which sentence of discommunication had been pronounced, in the Chancellor's Court, against persons not members of the University, many of whom had submitted to the sentence. In 1429, against *John Herterfeld*, draper and alderman of

the city of Oxford; *William Goldsmyth*, a burgess; *William Franklyn* and *John Walker*, bailiffs, and *Michael Norton*, remembrancer. In 1505, against *John Haynes*, formerly bailiff of the city. In 1513, against the then mayor of Oxford, for not staying proceedings commenced in the Mayor's Court against a privileged person. In 1561, against two bailiffs of the city, for violation of the privileges of the University, who submitted in the following month. In 1566, against a citizen of Oxford, for insolence to the proctors. In 1573, against another citizen, for violation of privilege. In 1575, against a citizen, who was committed to the castle for a breach of privilege in obstructing the officers of the University when going to the Guildhall to hold a court leet. In 1586, against *Isaac Bartholomew*, baker. In 1609, against the mayor and several citizens of Oxford, for violation of privilege, by refusing to set at liberty, at the request of the Vice-Chancellor, two matriculated persons whom they had imprisoned. In 1611, against *Thomas Wentworth*, the recorder of the city of Oxford, and several tradesmen, who were thereby interdicted from all commerce with any college, hall, or privileged person, for interfering with the night watch of the city: on appeal by the city to the Privy Council, the Lords, after a protracted argument, decreed that the practice of discommoning was not injurious or unlawful, and directed the offenders before restoration to make due submission, which was done in full convocation. In 1635, against an innkeeper, and in 1689 against two persons exercising the trade of barbers within the precincts of the University. In 1713, *Charles Aldrich*, of Christchurch, M.A. was cited to appear at the then next Chancellor's Court, for violating the privileges of the University, and especially in suing *William Stratford*, a canon of Christchurch, in the Court of Chancery, for matters determinable in the University Court. The Lord Chancellor, by an order under the great seal, interdicted the Vice-Chancellor of Oxford from all further proceeding, and the cause was suspended; but by a subsequent decree the cause was

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remitted before the Vice-Chancellor, with a direction to cite *Aldrich* to answer the charges to be exhibited against him. *Aldrich* was cited accordingly, and ultimately banished from the University. In 1733, *Dawson* was discommoned for selling wine within the precincts of the University without a licence; and in 1775, *Wood*, a bookseller, was likewise discommoned for buying books from scholars for less than their value. In 1786, *Hardman* was discommoned for exercising the trade of a barber without having been matriculated; and in 1803, *Wise*, a stationer, appeared in the University Court, and having confessed the charge of exercising the trade of a bookseller without matriculation or licence, was admonished, and ultimately discommoned. In 1820, *Speakman*, of the city of Oxford, a tailor, was discommoned for suing a member of convocation in one of the Courts at Westminster, in a cause determinable in the University Court. *Speakman* thereupon applied to the Court of Queen's Bench for a prohibition, which was not granted.

Sir *C. Wetherell*, Sir *W. W. Follett* and *H. S. Keating* shewed cause (a). By virtue of the charters and stat. 13 *Eliz.* c. 29, the Chancellor's Court has exclusive cognizance in personal actions where a member of the University is concerned: *Magdalen College* case (b). In *Aldrich v. Stratford* (c), Lord *Harcourt* recognized the authority of that court to vindicate the privileges of the University; and in *Speakman's* case (stated in the affidavits), this Court, refusing a prohibition, allowed its jurisdiction, in case of breach of privilege, over one who was not a member of the University.

Then, was there any excess of jurisdiction? *Taylor* was cited to appear, and refused. He was pronounced contumacious, and was ordered to pay the promoter's costs. It was an order to compel appearance. In *Tranter v. Wat-*

(a) In Easter term last (May 7),
 before Lord *Denman* C.J., *Patterson*
 and *Williams* Js.

(b) *Vin. Abr.* University (K),
 pl. 10.

(c) *Ibid.* pl. 11.

son (a), *Holt* C.J. said, "You come too soon for a prohibition, before appearance;" and per *Powell* J. "This process being only to compel the parties to appear, you come too soon for a prohibition before libel. We cannot determine the legality of the process in this manner." [Lord *Denman* C. J. If there is an excess of jurisdiction, can we exercise a discretion, and refuse the writ?] After sentence pronounced by a court of exclusive jurisdiction, this Court will look at the sentence only for the purpose of construing it: *Lord Camden* v. *Home* (b), *Grant* v. *Sir Charles Gould* (c). This Court cannot now take *judicial notice* that service of the writ on *Bourke* was not a breach of privilege: the want of jurisdiction must appear on the face of the proceedings: *Leman* v. *Goultly* (d). "After sentence, unless the want of jurisdiction be *manifest*, this Court will not interfere: by the sentence, the onus is shifted;" per *Patteson* J., in *Hart* v. *Marsh* (e). The burden is now cast on the other side of shewing that under no possible circumstances could the service of the writ be a breach of privilege, [*Patteson* J. Do you contend that it is incident to any court of exclusive jurisdiction to cite before it any person suing out of that jurisdiction? If a demandant sues a tenant in ancient demesne for his lands in any other than the court of the manor, can the lord cite him? He may, indeed, claim cognizance of the suit, or perhaps have an action on the case. A right to hold plea is one thing; a right to punish for suing out of the jurisdiction is another.] On the face of the proceedings it must be taken that *Taylor* was arrested for a contempt of court.

Sir F. Pollock and *Fisher* contrâ. The privileges claimed by the University cannot be allowed on motion: they must be pleaded: *Hinton* v. *Hern* (f), *Dodwell* v. *The University*

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(a) 2 *Ld. Raym.* 931.

(b) 4 *T. R.* 382.

(c) 2 *H. Bl.* 69.

(d) 3 *T. R.* 3.

(e) 5 *A. & E.* 591; *S. C.* 1 *N. & P.* 62.

(f) 2 *Salk.* 450.

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of Oxford (a). But, if allowed, they only establish that the Chancellor may discommon for any violation of those privileges. It is not necessary to dispute that power; but the court cannot fine and imprison an attorney for suing out of the jurisdiction.

Cur. adv. vult.

Lord DENMAN C. J. now said—The Court were of opinion that the University had exceeded its powers; that the effect of discommoning was merely to prevent the party discommoned from communication with the members of the University; that the University had no right to proceed to punish a person, who did not belong to their own body, for exercising the ordinary right of a subject in one of the Queen's Courts. That, as the Court had no doubt on the point, they would, according to their usual practice in clear cases, make the rule absolute for a prohibition at once, without putting the applicant to declare in prohibition.

Rule absolute for a prohibition.

(a) 2 Vent. 33.



Friday,
 June 18th.

The QUEEN v. The Inhabitants of the Township of
 HEAGE.

An indictment
 charging a
township with
 a customary
 liability to re-
 pair *all* roads
 within the
 township, and
 not limiting
 the liability to
 such roads as
 but for the

INDICTMENT for non-repair of a public highway.

The indictment, after stating the highway to be out of repair, alleged it to be "part and parcel of a certain public highway called the branch of the Cromford and Belper turnpike road, and that the inhabitants of the township of Heage, in the said county of Derby, from time whereof the memory of man runneth not to the contrary, have repaired

custom would have been repairable by the *parish*:—*Held* good (on motion in arrest of judgment), on the ground that there might be such a custom as alleged, and that, if there were any roads repairable *ratione tenuræ* or otherwise, it was for the defendants to shew it as a matter of evidence.

and amended, and been used and accustomed to repair and amend, and still ought to repair and amend, all common and public highways within the said township, used for all the liege subjects &c., and that by reason of the premises, and by force of the statute &c.," the defendants ought to repair, &c.

Plea: not guilty.

A verdict having been found for the crown at the Derby summer assizes, 1840,

Adams Serjt., in the Michaelmas term following, obtained a rule nisi to arrest the judgment (*a*), on the ground that the usage laid to repair *all* roads was too wide, as it would include roads which individuals would be liable to repair *ratione tenuræ* and *ratione clausuræ*, and therefore that the indictment should have followed the usual form, which was to allege a usage to repair all roads, which the parish would be bound to repair in the absence of such usage. He cited *Rex v. Hatfield* (*b*), *Rex v. Eastington* (*c*), and *Rex v. Bondgate in Auckland* (*d*), and *Rex v. Bridekirk* (*e*).

N. R. Clarke and *Willmore* now shewed cause. The only ground for contending that the customary liability of a township should be limited to such roads as the parish, without such custom, would have to repair, is, that the township is *part* of a parish, and that the *ordinary* liability of a parish has by the custom been put upon the township. But this argument cannot apply to an independent township, which has never been part of any parish, and there is nothing in this record to shew that the township of Heage is part of any parish. This township, therefore, may be under such a customary liability as is alleged.

(*a*) The indictment contained judgment on the first count.

four other counts which came in question. He moved also for a (*b*) 4 B. & Ald. 75.

new trial, but the ground of the judgment renders it unnecessary to report more of the argument than (*c*) 5 A. & E. 765; S. C. 1 N. & P. 193.

relates to the motion for arresting (*d*) 1 A. & E. 744.

(*e*) 11 East, 304.

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The indictment is good on the face of it, and if in point of fact the custom is not as extensive as laid, that is mere failure of evidence, for it is not to be assumed that in every township there is an individual liability *ratione tenuræ*, &c. The precedents certainly appear to limit the liability, but there is no necessity for it. They referred to *Rex v. Ecclesfield* (a), *Rex v. Kingsmoor* (b), *Rex v. Justices of West Riding* (c), *Rex v. Netherthong* (d).

Adams Serjt. and *Humfrey* contrà. [*Patteson* J. referred to the notes of Serjt. *Williams* to *Rex v. Stoughton*, 2 *Saund.* 157.]

Cur. adv. vult.

LORD DENMAN C. J., on the following day, delivered the judgment of the Court.—This is a motion in arrest of judgment, after a verdict for the crown, upon an indictment against a township for non-repair of a road.

The objection to the first count is, that it charges the township with a customary liability to repair *all* roads within it, whereas it ought to have charged a liability to repair all roads within it, “which but for the custom would be repairable by the parish.” Undoubtedly these words have of late years been uniformly introduced, but they are not necessary. Where they are introduced, they put the township *primâ facie* in the same situation as a parish, and, if the defendants mean to assert that any individuals are liable to repair the road in question *ratione tenuræ* or otherwise (if it can be), they must plead that matter specially. But where the words are omitted, and the defendants plead not guilty, it becomes incumbent on the prosecutor to prove that the township is liable to repair *all* roads within it, which may be, if there be none repairable by individuals; but, if the defendants can shew that there are any so repairable, they will negative the custom as being laid too largely. It

(a) 1 B. & Ald. 348.

(c) 4 B. & Ald. 693.

(b) 2 B. & C. 190; S. C. 3 D.
 & R. 398.

(d) 4 B. & Ald. 179.

is a question of evidence, and not of pleading, and in truth the words in question were introduced within living memory, for the very purpose of avoiding a failure, which frequently happened by reason of the custom laid being larger than the evidence warranted. Nevertheless, the custom may be as laid in the present indictment, if no roads in the township are repairable by individuals other than the inhabitants at large.

The first count therefore is good, and there is no necessity to examine the others.

D.

Rule discharged.

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DOE on the demise of C. and J. W. GRAHAM v. HAWKINS.

*Saturday,
June 19th.*

ON the trial of this case, before *Maule* B. at the Somersetshire summer assizes, 1840, the lessors of the plaintiff claimed under an assignment of a mortgage, alleged to have been made in 1801, to the master and governors of the old almshouse in Wells, and tendered in evidence a deed of that date, purporting to be a mortgage to the said master and governor for 300*l.* For the defendant it was objected that the deed was void for want of inrollment within six months after execution, as required by 9 *Geo.* 2, c. 36, s. 1. The learned judge proceeded with the case and reserved the point.

Quere, whether a deed conveying lands, by way of mortgage, to the trustees of a charity, is within the Statute of Mortmain (9 *Geo.* 2, c. 36, s. 1), so as to require inrollment in Chancery.

Held, 1. that, at all events, such a deed has not a "condition for the benefit of a grantor," within the meaning of 9 *Geo.* 4, c. 85, s. 1, and therefore, if executed before the passing of that act, is

valid without inrollment.

2. Entries, in the account book of a deceased steward, of the receipt of money by the steward, in the handwriting of his clerk, is evidence of such receipt, although the clerk who made the entries is alive and not called as a witness, where it appears that the steward adopted such entries by presenting them to be audited.

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almshouse, who had died a few days before the trial. The witness stated that he was one of the clerks in the employment of the deceased master, and spoke to entries in the book in 1824, and subsequent years, down to 1828, of payment by the mortgagee of sums of 15*l.*, as a year's interest on the above sum of 300*l.*; that these entries were in the handwriting of another clerk, who was alive, and that the book was presented by the deceased master, as his book of accounts, to the governors of the charity, at their meetings, and that on these occasions the accounts were audited and signed by the auditors. The clerk, in whose handwriting the entries were, was not called. Another witness spoke to his having himself audited and signed some of these accounts, containing such entries. It was objected for the defendant, that these entries were not evidence of payment, because they were not in the handwriting of the deceased himself, or of the witness who spoke to them. The learned judge received the evidence, and the lessors of the plaintiff obtained a verdict.

Bompas Serjt. in the following Michaelmas term, obtained a rule nisi to enter a nonsuit on the first objection, referring to *Mogg v. Hodges* (a), and *Attorney-General v. Whitchurch* (b), to shew that the almshouse was within the Mortmain Act. He obtained also a rule nisi for a new trial on the second objection.

Erle and *Kinglake* now shewed cause. By the 9 *Geo.* 2 (c), c. 36, s. 1, the conveyance to the almshouse would

(a) 2 Ves. sen. 52.

(b) 3 Ves. 141.

(c) Sect. 1 enacts, "that from and after 1736, no manors, lands, tenements, rents, advowsons or other hereditaments, corporeal or incorporeal whatever, nor any sum or sums of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate whatsoever, to be laid

out or disposed of in the purchase of any lands, tenements or hereditaments, shall be given, granted, aliened, limited, released, transferred, assigned or appointed, or any ways conveyed or settled to or upon any person or persons, bodies politic or corporate, or otherwise, for any estate or interest whatsoever, or anyways charged or incumbered by any person or persons

require enrolment, but the 2d section had been commonly understood to except such conveyances for valuable consideration. And the 9 *Geo.* 4, c. 85, s. 1, recites that the above mentioned section had been so understood, and then clears up all doubt upon the matter by enacting, "that where any lands, tenements or hereditaments, or any estate or interest therein, have or has been purchased for valuable consideration, in trust or for the benefit of any charitable uses whatsoever, and such full and valuable consideration has been actually paid for the same, every deed or other assurance *already* made, for the purpose of conveying or assuring such lands, tenements or hereditaments, estate or interest as aforesaid, in trust or for the benefit of such cha-

whatsoever, in trust, or for the benefit of any charitable uses whatsoever, unless such gift, conveyance, appointment or settlement of any such lands, tenements, hereditaments, sum or sums of money, or personal estate (other than stocks in the public funds) be, and be made by deed, indented, sealed and delivered, in the presence of two or more credible witnesses, twelve calendar months at least before the death of such donor or grantor (including the days of the execution and death), and be enrolled in his majesty's Court of Chancery, within six calendar months next after the execution thereof; and unless such stocks be transferred in the public books, usually kept for the transfer of stocks, six calendar months before the death of such donor or grantor (including the days of the transfer and death), and unless the same be made to take effect in possession for the charitable use intended, immediately from the making thereof, and be without power of revocation, reservation, trust, con-

dition, limitation, clause or agreement whatsoever, for the benefit of the donor or grantor, or of any person or persons claiming under him."

Section 2, "Provided always, that nothing hereinbefore mentioned relating to the sealing and delivering of any deed or deeds twelve calendar months at least before the death of the grantor or to the transfer of any stock six calendar months before the death of the grantor or person making such transfer, shall extend or be construed to extend to any purchase of any estate or interest in lands, tenements or hereditaments, or any transfer of any stock to be made really and *bonâ fide*, for a full and valuable consideration actually paid, at or before the making such conveyance or transfer without fraud or collusion."

Sect. 3 enacts, that all conveyances, &c. "made in any other manner or form than by this act is directed and appointed, shall be absolutely, and to all intents and purposes, null and void."

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ritable uses (if made to take effect in possession, for the charitable use intended, immediately from the making thereof, and without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatsoever, for the benefit of the grantor, or of any person or persons claiming under him), shall *be as good and valid*, and of the same effect, both for establishing derivative titles and in all other respects, as if the several formalities by the said act prescribed had been duly observed and performed."

With regard to the entry in the account book as evidence of money received by the deceased master, the objection which appears to be founded on *De Rutzen v. Farr*(a), is clearly untenable, for in that case the clerk was not shewn, otherwise than by the accounts themselves, to have been employed by the steward, whose accounts they were said to be. In this case the writer of the entries in question was proved to have been agent of the master of the almshouse, and the master himself had adopted these entries, by presenting them to be audited as part of his accounts.

Edwards contra. The 9 *Geo.* 4 does not set up conveyances, containing conditions for the benefit of the grantor; and the conveyance in question was a mortgage deed, with the usual power of redemption, which was a condition in favour of the grantor. He referred to *Attorney General v. Munby* (b).

With regard to the entries in the account book, the clerk who made them and who received the money was alive. The ground therefore of necessity, on which the handwriting of a deceased party against his interest is allowed to be evidence of the subject matter of the writing, does not exist. The clerk who received the money should have been called; the entries were not against the interest of the clerk who made them, or of the clerk who spoke to them.

Lord DENMAN C. J.—I think the word condition in
 (a) 4 Ad. & E. 53; S.C. 5 N. & M. 617. (b) 1 Meriv. 342.

the 9 Geo. 4 was intended to prevent fraudulent revocation, and that it does not apply to the redemption clause in a mortgage deed.

As to the point of evidence, I am of opinion that the handwriting of the clerk, so recognised and acted on by the master, is to be considered the handwriting of the master himself. It would be absurd, that what a man writes with his own hand should be evidence, and that what he writes by the hand of his agent should not. In *De Rutzen v. Farr* (a) there was nothing but the mere handwriting, purporting to be that of the steward's clerk, for the parol evidence that the writer was clerk was not taken by the Court to be part of the case, and there was no proof that the steward, whose clerk the writer was supposed to have been, had ever acted on the writing.

PATTESON J.—I doubt whether the Mortmain act (9 Geo. 2) was intended to apply to mortgages. The words of the act may include mortgages, and it may, for any thing I know, be necessary to inrol mortgage deeds, for the 9 Geo. 4 does not do away with the necessity of inrolment for the future, but merely cures defects with respect to deeds already executed.

But this deed having been executed before the passing of the 9 Geo. 4 is clearly set up thereby, unless it contain a condition for the benefit of the grantor, so as to be excepted from that act. I cannot conceive how a proviso for redemption in a mortgage deed can be such a condition. The land is in pledge for the loan, and when the loan is repaid the grantor gets his land back; this is stipulated for by the mortgage deed, but there is "no condition for his benefit," by which must have been meant something inconsistent with what the deed professes to be, and not *bonâ fide*.

Upon the question of evidence I take it to be clear that the entry is to be taken as the entry of the master; he

(a) 4 Ad. & E. 53; S. C. 5 N. & M. 617.

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adopted it after it was written, and that is the same as if he had authorised it before it was written. It is the same thing as if he was present with his hand disabled, and wrote by the hand of his agent. It is said that the clerk who made the entries should have been called to speak to them, and to prove the circumstances (a) under which the payments had been made. That was matter of observation only; it was sufficient to shew that the entries had been adopted by *Melliar*.

WILLIAMS J.—I think the mortmain act was intended to protect persons of enfeebled mind who might make over their property to what was called superstitious uses, and that it does not apply to mortgages.

I quite concur also upon the question of evidence; it is the same as if *Melliar* directed the clerk to make the entry.

D.

Rule discharged.

(a) The defendant's case was, that an agent of the mortgagor had embezzled the mortgage money which he had received for the purpose of paying off the mortgage money, and that the interest had been paid from year to year

by a stranger to the mortgagor, for the purpose of concealing the fraud; and that, if the clerk who received the interest and made the entries had been called, this might be shewn.

END OF TRINITY VACATION.

## MICHAELMAS TERM,

IN THE FIFTH YEAR OF THE REIGN OF VICTORIA, 1841.

The Judges who usually sat in Banc this Term were,  
 Lord DENMAN C. J. COLERIDGE J.  
 WILLIAMS J. WIGHTMAN J.

In the Bail Court,  
 PATTESON J.

Monday, Nov. 22, 1841.

Queen's Bench Prison.—It is ordered, that from henceforth Bethlem Hospital, in the county of Surrey, and also the gardens and grounds belonging to the same, and the roads and approaches leading thereto shall be within and parcel of the rules of the prison of this Court.

By the Court.

The QUEEN *v.* The Inhabitants of ST. GILES IN THE  
 FIELDS. (a)

ON appeal against an order for the removal of *Henry Walton* a pauper, from the parish of St. Giles in the fields, in the county of Middlesex, to the parish of St. James, Westminster, the sessions quashed the order, subject to the opinion of the Court on the following case:

The pauper, on the 6th day of September in the year

(a) Decided H. T. 1842, Jan. 19.

side within ten miles thereof, and does not merely suspend it. A settlement claimed under the stat. 13 & 14 Car. 2, c. 12, s. 1, by "coming to settle" on a tenement of the yearly value of 10*l.*, in right of the pauper's own estate in it, is a settlement by possession of an estate within the meaning of that act.

The Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 68), extinguishes a settlement "by possession of an estate or interest" on the pauper ceasing to re-

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1826, became the purchaser for the sum of 1575*l.* of certain leasehold premises, called the Turk's Head, situate in the appellant parish. The leasehold interest purchased by the pauper was for an unexpired term of 94 years, subject to the reserved annual rent of 150 guineas; and on the day above mentioned he paid the purchase money, and a conveyance of the premises was duly executed to him. The pauper and his family occupied the premises from the time of the purchase until June 1827, when an execution was put into the house, under which the pauper's goods were sold. The house was then shut up until the 25th day of October in the same year, when the pauper assigned the lease to another party, who thereupon entered into possession of the premises, and the pauper never returned to them. The pauper has not since that time done any act to gain a settlement elsewhere. The pauper paid the reserved rent for the whole period that he held the lease. In 1830, the pauper removed to and resided at a place more than 10 miles distant from the appellant parish.


The question for the opinion of the Court is : Whether upon the above facts the pauper was at the time of the order of removal legally settled in the appellant parish.

If this be decided in the affirmative, the order of sessions is to be quashed, if otherwise the order of sessions is to be confirmed.

*Adolphus.* There is no ground for disturbing the order of sessions. The pauper here lost his settlement by estate, he having ceased at one period to inhabit within ten miles thereof: 4 & 5 *Will.* 4, c. 76, s. 68. It was clearly the intention of that section of the act, that a cessation to reside within the prescribed distance should put an end to the settlement previously acquired by estate for ever, and should not suspend it merely.

Then there was no settlement acquired by renting a tenement, for the stat. 6 *Geo.* 4, c. 57, requires both a holding, and an occupancy, therein differing from the stat. 59 *Geo.* 3,

c. 50 : *Rex v. Ditchet* (a). Here there was no occupancy at all for a portion of the year. Payment of rent will not do per se. If the pauper had merely gone away animo redeundi, it might have been different.

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*Kelly* contra. The 68th section of the Poor Law Amendment Act suspended only, and does not destroy, a settlement by estate, if the pauper reside beyond the prescribed distance. [Lord *Denman* C. J. Can you make that construction consistent with the language of the statute? It says, "in case such person shall cease to inhabit within the prescribed distance, and *hereafter* become chargeable," he shall be liable to be removed.]

If that be not so, still the pauper had a settlement, independent of the settlement by estate, by the operation of the stat. 13 & 14 *Car.* 2, c. 12, which gives a settlement to any person who "comes to settle" upon any tenement of the yearly value of 10*l.* It is sufficient to confer a settlement under that act, that he comes to settle under a lawful interest in himself; *Rex v. The Inhabitants of St. Mary, Newington* (b). The stat 59 *Geo.* 3, c. 50, does not affect this question, it is confined to settlement by renting a tenement. It is true that under the statute the pauper, in respect of this same tenement, also acquired a settlement by estate, but that was independent of his residence on the tenement, and there is nothing to prevent a double right of settlement being given by the same act, and, if the settlement by estate is now determined by the non-residence, at all events the settlement acquired by coming to settle on a tenement of the yearly value of 10*l.* is still in force. That was acquired by something more than mere possession of an estate.

LORD DENMAN C. J.—I think the settlement set up in this case by settling on the tenement of the pauper, can be

(a) 9 B. & C. 176; S. C. 4 M. (b) 5 B. & Ad. 540; S. C. 2 N. & R. 151. & M. 357.

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considered as claimed only "by virtue of the possession of an estate," and that therefore it is put an end to by the statute, (4 & 5 Will. 4, c. 76, s. 68), on the pauper ceasing to reside within ten miles of it.

PATTESON, COLERIDGE and WIGHTMAN Js. concurred.

G.

Order of Sessions confirmed (a).

(a) See the next case.

The QUEEN v. The Inhabitants of WHISSENDINE (b).

A person who inherited a real estate, and thereby acquired a settlement, lived with his mother in a house, part of the estate. He became insane and was removed by his relations to the county asylum, which was more than ten miles from the parish in which the estate was. He was maintained in it, during four years, partly by his relations and partly from the rents of his estate: — *Held*, that on being removed to the asylum, he, though a lu-

**APPEAL** by the parish of Whissendine, in the county of Rutland, against an order of two justices of the borough of Leicester, calling upon the parish of Whissendine to pay the sum of 12s. per week towards the support of a lunatic, named *Edward Peach*, then being in the Leicester County Lunatic Asylum, and adjudging the last legal settlement of the said *E. Peach* to be in the said parish of Whissendine. The sessions confirmed the order, subject to the opinion of this Court on the following case:

*E. Peach*, the pauper, was entitled, under the will of his father, *Robert Peach*, to one-seventh share of his real estate, situated in the parish of Whissendine, in the county of Rutland. He was born in the parish of Whissendine, in the year 1810, and resided there with his mother until he was about fourteen years old (in the year 1824). He was apprenticed to *John Hind*, an ironmonger, in the parish of St. Martin's, Leicester. He served three years in that parish, when he ran away from his master and went home to his mother at Whissendine. Shortly afterwards, and in

(b) Decided Hil. T. 1843, (Jan. 19).

natic at the time of his removal, had "ceased to inhabit" within the meaning of the stat. 4 & 5 Will. 4, c. 76, s. 68, and had therefore lost his settlement by estate.

the year 1827, the indentures were duly cancelled by mutual consent. From this period until the beginning of the year 1837, he continued to live with his mother in a house, part of the estate, in the parish of Whissendine, devised to him and his brothers and sisters by his father's will, and thereby gained a settlement by estate in the parish of Whissendine. In the year 1837, having become quite insane, he was removed to the Leicester County Lunatic Asylum, where he remained until the month of April, in the year 1841, being maintained partly by his relations and partly by his proportion of the rents of his estate, the latter alone being insufficient for his support. In the month of April, his relations declining to contribute any longer to his support, he was taken from the asylum and brought to the parish of Whissendine, and remained there one night, but on the parish officers of Whissendine declining to acknowledge him as their pauper, he was taken back to Leicester, and the necessary warrant and order of two justices of the borough of Leicester, for his removal to the same asylum, and his maintenance there, at the expense of the parish of Whissendine, as a pauper lunatic, were duly obtained, made, and served on the parish officers of Whissendine, and he was accordingly removed.

At the trial the appellants proved a settlement by apprenticeship in the parish of St. Martin's, Leicester. The respondents relied on the subsequent settlement by estate, which was gained in the parish of Whissendine, after the pauper left St. Martin's. The appellants then contended that, under the stat. 4 & 5 Will. 4, c. 76, s. 68, the settlement gained in Whissendine, by the pauper's residence on his estate, was destroyed by his removal into the asylum at Leicester, more than ten miles therefrom; that the effect of 4 & 5 Will. 4, c. 76, s. 68, was to do away settlements by estate, and to throw the pauper back on the antecedent settlement, and that therefore the settlement of the pauper was in the parish in which he was apprentice.

For the respondents it was contended that the case was

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not within the 68th section of 4 & 5 *Will.* 4, c. 76, and that such section did not apply to the involuntary removal of an insane person. The recorder confirmed the order, subject to the opinion of this Court.

*Mellor*, in support of the order of sessions. The question turns upon the 4 & 5 *Will.* 4, c. 76, s. 68. That section enacts, that "no person shall be deemed, adjudged, or taken to retain any settlement, gained by virtue of any possession of any estate or interest in any parish, for any longer or further time than such person shall inhabit within ten miles thereof; and in case such person shall cease to inhabit within such distance, and thereafter become chargeable, such person shall be liable to be removed to the parish wherein, previously to such inhabitancy, he may have been legally settled, or in case he may have, subsequently to such inhabitancy, gained a legal settlement in some other parish, then to such other parish."

It is contended, on the part of the respondents, first, that the section does not apply to the case of pauper *lunatics*; secondly, if it does apply, then that upon the true construction of the section, the pauper did not lose his settlement by estate in the appellant parish, by his involuntary removal to the lunatic asylum at Leicester. First, the legislature did not contemplate any interference with pauper or criminal lunatics; they are exceptions to the general laws which regulate paupers and criminals. There was no intention to alter or interfere with the provisions of the 9 *Geo.* 4, c. 40, which contains all the provisions regulating lunatic paupers. Their removal and maintenance is specially provided for, and is conducted upon principles essentially different from the removal and maintenance of other paupers. Comparing the recital in the 4 & 5 *Will.* 4, c. 76 with the recital in the 9 *Geo.* 4, c. 40, the Court will see what different language is used when lunatic paupers are to be affected to what is used with regard to ordinary paupers. They are entirely under a different code. An

ordinary pauper can acquire a settlement by marriage: a lunatic cannot. Neither can he enter into a contract of hiring and service, or apprenticeship, or of renting a tenement, or of purchase of an estate. An ordinary pauper cannot be removed from his estate, a lunatic pauper may. There are many instances in which strong general words have been restrained: *The Mayor of Leicester v. Burgess* (a), which turned upon the construction of the Beer Act (b), which enacted, "that from and after the 10th day of October, 1830, it shall and may be lawful for *any and every person* who shall obtain a licence for that purpose, under the provisions of this act, to sell beer, ale and porter, by retail, in any part of England, *in any house or premises* specified in such licence; any thing in any act or acts heretofore made or in force at the time of the passing of this act to the contrary in anywise notwithstanding;" and this Court decided that, strong as these words were, they did not interfere with or affect the bye-law of the corporation of Leicester, which restrained the sale of beer within the borough to burgesses and the widows of burgesses.

*Zouch v. Stowell* (c) is also in point. It is therefore contended that, if the legislature had meant in any way to interfere with the case of pauper lunatics, some reference to the 9 Geo. 4 would have appeared. Secondly, upon the true construction of the section, the settlement by estate was not lost by the removal to the asylum. The whole section must be read together, and the question will be, did the pauper "cease to inhabit" in the appellants parish?

The word "inhabit" is undoubtedly susceptible of various meanings, according to circumstances, but it does not necessarily imply actual residence. Lord Coke, in his reading on the statute of Bridges (d), which imposes the charge of their repair upon inhabitants, uses the following language: "First, although a man be dwelling in an house in a forraigne

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(a) 5 B. & Ad. 246; S. C. 2 N. & M. 131.

(c) Plowden, 366; Bac. Ab. Stat. (I. 5).

(b) 11 Geo. 4 and 1 Will. 4, c. 64, s. 1.

(d) 2 Inst. 703.

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county, riding, city or towne corporate, yet if he hath lands or tenements in his owne possession and manurance in the county, riding, city or towne corporate, where the decayed bridge is, he is an inhabitant both where his person dwelleth and where he hath lands or tenements in his own possession."

*Rex v. Sargent* (a) and *Rex v. Mitchell* (b) are in point also, to shew the extreme latitude with which the Courts have construed the qualification of residence in municipal charters. The words "cease to inhabit" in the present section are of much wider signification than either residence or inhabitancy considered alone. "Ceasing to inhabit" must imply some exercise of the will; this pauper was incapable of it, and indeed it is stated on the case, that he *was removed* to the lunatic asylum. By no act of his own has he ever departed from the parish in which his estate is situate. So far as his own conduct is concerned, he is to be considered as still residing there. He has made no change. He has done nothing to indicate that he has ceased to inhabit. [*Patteson J.* What would you say of a man imprisoned under sentence in gaol beyond the distance, would he cease to inhabit?] That would depend upon circumstances. If he left a wife or children or furniture, and thereby shewed an intention to return, it is contended that he would not. In the present case, no change has occurred in the circumstances of the pauper, save the fact of his involuntary removal. There is, however, a distinction between the case of a prisoner and a lunatic, and the legislature appear to have thought so, for in the gaol acts there is a declaration that the residence in gaol shall not be contributory to a settlement. So in the lying-in hospital acts. But there is no such provision with reference to lunatic asylums. Occupation of rooms in a lunatic asylum is not the subject of a rate, *Rex v. Luke's Hospital* (c), although under other circumstances it could not be contended that it

(a) 5 T. R. 466.

(b) 10 East, 510.

(c) 2 Burr. 1083.

was not a rateable occupation: *Governors of Bristol Poor v. Wait* (a). The section in its very words seems to contemplate the case of persons able to acquire subsequent settlements, and it is extremely difficult to see how a lunatic could. At what period did this pauper cease to inhabit? Was it the first moment he passed the dividing line of the ten miles, or was it the moment when he was safely lodged within the walls of the asylum?

If the Court decide that the lunatic by this removal lost his settlement by estate, it will open a door to the most serious frauds. Every parish burthened with paupers settled by estate, will endeavour to get rid of them by some forcible removal beyond the prescribed distance, and thus throw the charge upon the prior settlement. [*Coleridge J.* Another difficulty presents itself. When the justices have made an order to remove a pauper lunatic to the asylum, and have ascertained the parish in which he is then settled, and made an order upon that parish for his maintenance, according to the 9 *Geo. 4*, are they, the next day after his removal is accomplished, to make a fresh inquiry into his settlement, and a new order for his maintenance, upon the parish in which his prior settlement was?] Undoubtedly this raises a most serious difficulty in the way of the appellants, and shews that any other view of the section than that now contended for, must lead to the most absurd and inconsistent results.

*G. T. White* and *Spellen* contra were stopped by the Court.

LORD DENMAN C. J.—It appears to me, if the legislature had been called upon to make provision for this case, they could not have made use of stronger language. The words are not “go” or “depart,” but “cease to inhabit.” It is certainly very possible that all the consequences of this enactment were not before the legislature in framing this statute;

(a) 5 Ad. & El. 7; S. C. 6 N. & M. 388.

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but that consideration will not authorise us to refuse to give effect to language which is clear and unambiguous.

PATTESON J.—It is quite clear that, in order to satisfy this section of the statute, it is not necessary for the pauper to have resided, in the legal sense of the word, elsewhere. It certainly did appear to me, at first, very strange, that a parish might remove a lunatic pauper, and so rid themselves of the burden of his maintenance, but such is not the case here, the pauper was in the first instance removed by his relations. I have no doubt that he then “ceased to inhabit.”

COLERIDGE J.—I still entertain some doubts whether this case was in the contemplation of the framers of the statute, but, upon the whole, I think this pauper ceased to inhabit within the meaning of it.

WIGHTMAN J.—There may in some cases be difficulties in the application of this law, but they do not exist in this instance. The words are too strong to be overcome.

G.

Order of Sessions quashed (a).

(a) See the preceding case.

Wednesday,  
 November 3d.

The Court on motion directed a mandamus to go peremptorily in the first instance, commanding a gaoler to give up for burial the body of a debtor dead within the

In the matter of the Bailiff of WAKEFIELD.

SIR W. W. FOLLETT S. G. moved for a mandamus to be directed to the lord of the manor of Wakefield, and the keeper of the gaol at Halifax within the manor, commanding them to give up the body of a debtor who had died within the gaol to his executors for interment. It appeared on the affidavits made in support of the motion, that an inquest had been held on the body, and that the coroner had issued his warrant for the burial, but that the gaoler refused to give it up, it being sworn that he refused to do so until a certain sum he claimed, as a debt owing by the deceased for maintenance, were paid.

up on demand made upon him, unless a certain sum, alleged to be due to him for the maintenace of the deceased, and for wines, &c. supplied to him, should be paid.

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Lord DENMAN C. J.—We think the writ should go peremptorily in the first instance, and the party may have liberty to return any denial or excuse of the charge without being in contempt.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

G. Rule absolute accordingly.

BROOK v. JENNEY and another.

Thursday,  
Nov. 11th.

**TRESPASS** for cutting the trees, bushes shrubs and thorns of the plaintiff.

Plea: not guilty "by statute."

The case was tried before *Patteson J.* at the Suffolk summer assises, 1840. The trespass proved was that the defendants had cut and damaged a hedge of the plaintiff. The defendants justified under 5 & 6 Will. 4, c. 50. s. 65 (a),

(a) This section enacts "That if the surveyor shall think that any carriageway or cartway is prejudiced by the shade of any hedge, or by any trees, except those trees planted for ornament or for shelter,

By 5 & 6 Will. 4, c. 50, s. 65, "if the surveyor shall think a carriageway or cartway, &c. prejudiced by the shade of any hedges, and that the sun and wind are excluded from such highway, or if any obstruction is caused

in any carriageway or cartway by any hedge or tree, it shall be lawful for one justice, &c." to summon the owner of the hedges at a special sessions, "to shew cause why the said hedges are not cut, &c. in such manner that the carriageway, &c. shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway, &c. to the damage thereof, or why the obstruction caused in such carriageway, &c. should not be removed, &c. and if such justices shall order that such hedges shall be cut, &c. in manner aforesaid, or such obstruction removed," and the owner shall not comply within ten days, he may be convicted and fined, and the surveyor may himself cut the hedges.

In trespass for cutting the plaintiff's hedge, a surveyor justified under the act, because the plaintiff had failed to comply with an order, reciting that the plaintiff had neglected to cut his hedge, "whereby the sun and wind were excluded from the carriageway, &c. to the damage thereof, and whereby also obstructions were caused therein," and ordering him to cause the said hedges to be cut, and the said obstruction to the damage of the said highway to be removed, &c.

*Held*, that the order was bad in substance, and did not justify the surveyor; because it required the plaintiff to cut his hedge generally, without specifying the manner in which it was to be done.

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on the ground that the plaintiff had failed to comply with the following order of justices.

The order recited the complaint on the oath of one of the defendants that the plaintiff, "being the owner of a certain farm, hereditaments, and premises situate in the said parish of &c. in the occupation of &c. had neglected or refused to cut, prune, or plash the hedges, and to prune or lop the trees hereinafter mentioned upon his said farm at &c. that is to say, the several trees on the right hand side of the said carriageway or cartway, situate in the said parish of &c. leading from &c. to &c., growing or standing in the fence of

to any hop ground, house, building, or court yard of the owner thereof, growing in or near such hedges or other fences, and that the sun and wind are excluded from such highway to the damage thereof, and if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land, on which such hedges or trees are growing *next adjoining* to such carriageway, or cartway to appear before the justices at a special sessions for the highways, to shew cause why the said hedges are not cut, pruned or plashed, or such trees not pruned or lopped *in such manner* that the carriageway or cartway shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway or cartway to the damage thereof; or why the obstruction caused in such carriageway or cartway should not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the pruning and lopping such trees, or the removal

of such obstruction as aforesaid, shall upon proof of the service of such summons, and whether the owner attend or not, be determined at the discretion of such last mentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned or plashed, or such trees pruned and lopped in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner, or of his steward or agent, and in default thereof shall forfeit on conviction a sum not exceeding forty shillings; and the said surveyor, if the order of the said justices is not complied with, shall and he is hereby authorised and *required to cut, prune or plash* such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this act."

a certain field called &c.; also the trees growing or standing in a belt or plantation on the right hand side of the said carriage way or cart way, approaching the front entrance to the farm house belonging to him the said *A. B.* (the plaintiff); and also in the belt or plantation on the same side of the said carriage way or cart way beyond the said entrance, and the gate leading into his said farm yard; and also the trees and hedges on the same side of the said carriage way or cart way growing or standing in a fence adjoining a certain field called Shortlands; and likewise the trees and hedges on the left hand side of the said carriage way or cart way growing or standing in the fence of a certain other field called &c., whereby the sun and wind were excluded from the said carriage way or cart way to the damage thereof, and whereby also obstructions were caused in the said carriage way or cart way contrary to the statute in that case made and provided. And whereas also the said *A. B.* (the plaintiff) has appeared before us the said justices at the special sessions for the highways held at &c. on &c. in pursuance of a summons duly served upon him to answer the said charge, and the said offence has been fully proved before us upon the oath of *G. R.* also one of the surveyors of the said highway, we the said justices hereby order the said *A. B.* *to cause the said hedges to be cut, pruned or plashed*, and the said trees to be pruned or lopped, and the said obstruction complained of to the injury or damage of the said highway removed within ten days from the service hereof." &c. &c. Several objections were taken to the order and overruled. Verdict for the defendants.

*Kelly* in the Michaelmas term following moved for a new trial on the ground of misdirection. He made four objections to the order: 1. That the order did not bring the plaintiff within the statute, as it did not state that he was the owner of the land *next* adjoining the road. 2. That the order for the plaintiff to cut &c. was absolute, and not to cut *in such manner* that the road should not be injured by the exclusion of the sun and wind. 3. That the order was

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to cut, prune or plash, in the alternative. 4. That the order recited that the said *offence* had been fully proved, whereas it was no offence to refuse to cut before the order was made.

Biggs Andrews and *Byles* now shewed cause. (The ground on which the Court gave judgment renders it unnecessary to give the argument on any objection except the 3rd). The objection, that the order to the plaintiff to cut his hedge does not point out in what *manner* he is to cut, is an objection of form only and, therefore, if tenable, is cured by the 107th and 118th sections of the act, and this Court has always construed orders less strictly than convictions, and supported them by every reasonable intendment. *Rex v. Morris(a)*, *Rex v. Middlehurst(b)*.

But the order does sufficiently indicate the manner in which the plaintiff was to do the act required. The order recites that by reason of the plaintiff not cutting his hedge the sun and wind were excluded from the road, to the damage thereof, and obstructions caused therein, and then requires him to cause his hedge to be cut and the said obstruction to the damage of the road to be removed. He is to cut therefore in such manner as to remove a specified obstruction.

It is however immaterial to the defendants whether the order is good or bad. The justification of the defendants depends not upon the order, but upon the statute. By the statute they were bound to obey the order, under the penalty imposed by the 20th section. If the order was bad, it should have been quashed on appeal, for an "order being a judicial act continues an order till avoided:" *Hall v. Biggs(c)*. The order is a judgment, and, so long as it subsists, its defects cannot be taken advantage of in a collateral proceeding like the present: *Prigg v. Adams(d)*.

Kelly (with whom was *O'Malley*) *contra*. The 107th

(a) 4 T. R. 550.
 (b) 1 Burr. 399.

(c) 2 Salk. 674.
 (d) 2 Salk. 674.

section applies to quashing orders for want of form and to removing them by certiorari. The present objection is not of a formal character and may be insisted on by action, notwithstanding the certiorari clause. All orders whether of justices or of the Lord Chancellor must state facts to shew jurisdiction, and there is no distinction in this respect between an order and a conviction: *Day v. King(a)*, *Christie v. Unwin (b)*. The surveyor is invested with power to enter upon the premises of another in default of his doing a particular act after lawful demand upon him to do it. It is right, therefore, that the owner of such premises should have full notice of that which he is to do. This order requires the plaintiff to remove the "obstruction," but "obstruction" is too general a term, and its introduction cannot cure the previous defect in the order. The statute authorises the justices to call upon a person to shew cause why he should not cut his hedge, so that the road shall not be prejudiced by the shade &c. and justices may order him to cut in *the manner aforesaid*, but they are not authorised to make an order upon a person generally to cut his hedge. The word "obstruction" in the act plainly signifies something different from the obstruction occasioned by the shade of trees and hedges. The order should have required the plaintiff to cut his hedge in a particular way, so as to produce a particular effect, viz. so that the hedge should not injure the road by excluding the sun and wind. In *Rex v. Walsh (c)* a conviction for detaining the certificate of a ship's registry was held bad because it did not state the purpose for which the certificate was wanted. (He was then stopped.)

Lord DENMAN C. J.—We all think this a fatal objection. It is to be lamented that the words of the statute were not adopted. Where an order requires a party to do an act

(a) 5 A. & E. 359; S. C. 6 N. & M. 845.

(b) 11 A. & E. 373; S. C. 3 P. & D. 204.

(c) 3 N. & M. 632.

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necessarily involving the exercise of some discretion, it is necessary he should have some direction to guide him in doing the act. The justices should have ordered the plaintiff not simply to remove the obstruction, but do it in the manner and for the purposes specified by the statute.

PATTESON J.—I am of the same opinion, though I had some doubt during the argument whether it was not immediately under the act that the defendants justified, and whether the order was not unnecessary to their defence. But the surveyor is not himself to act, unless the order is disobeyed, and cannot be protected in acting unless the order disobeyed is a good order.

WILLIAMS J.—The language of the 65th section removes all doubt. The surveyor is not to act until after default made in complying with the order of justices; and it is non-compliance with a good order only that can justify the surveyor in acting. Now the order to be made by the 65th section is that such hedges shall be cut &c. in manner *aforesaid*, that is, (referring to the previous words,) “in such manner that the carriage way or cart way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage way or cartway to the damage thereof, and why the obstruction caused in such carriage way or cart way should not be removed.” This order omits all mention of the manner in which the hedge is to be cut.

COLERIDGE J.—I am of the same opinion. There is undoubtedly an apparant hardship in the case of the defendants. This is often the case where inferior officers have to act upon the orders of those above them, and was the case with constables before the legislature interfered to protect them. The defendants are *primâ facie* trespassers; they justify however under an order of justices. That order is no order, if substantially defective. The defect relied on is a defect in substance. All that the plaintiff could have

been required to do was to cut his fences in a particular way, so as to produce a certain specific result, and this order is general and unqualified.

D.

Rule absolute.

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DOWNES v. GEORGE COOPER.

*Monday,
Nov. 8th.*

REPLEVIN. The defendant avowed the taking as a distress for rent arrear. The plaintiff's plea in bar to the avowry was as follows:—

That the defendant ought not to avow the taking of the said goods and chattels in the declaration mentioned in the said dwelling-house in which &c., and justly &c., because that before the said time when &c., to wit, on the day and year in the declaration mentioned, certain disputes and differences had arisen, and were then pending, between the defendant and one *Thomas Cooper*, touching and concerning the right, title and interest of and into the said undivided third part in the said avowry mentioned of the said dwelling-house in which &c., insomuch that the plaintiff did not know to which of the two he was in law bound to pay his rent in respect thereof, and thereupon, for the putting an end to the said differences, the said defendant and *Thomas* then, to wit, on the 6th day of May, 1839, and before the time when &c. respectively submitted themselves to the opinion of one *Edward Purton Cooper*, to be given of and concerning the said differences, and in consideration thereof, and that the said *Thomas*, at the request of the defendant, had then promised the defendant to abide by the opinion of the said *Edward Purton Cooper*, to be so given in and upon the premises, in all things therein contained on his part to be abided by, the defendant then promised the said *Thomas* to abide by the same in all things therein contained on his part to be abided by, and the plaintiff in fact saith, that the said *Edward Purton Cooper*, having taken upon himself the burthen of the said opinion, afterwards and before the said acts had not admitted that his title was at an end, and consequently did not

The defendant demised premises to the plaintiff, who paid rent regularly for them for some years to the defendant; disputes having arisen between the defendant and a third party as to the rightful ownership of the demised premises, it was agreed to abide by a case to be submitted to a barrister, who gave his opinion in favour of the third party, whereupon the plaintiff being informed of the decision paid his rent to the third party. The defendant distrained for rent due after the decision, and the plaintiff pleaded the facts above stated. *Held*, that it was a question for the jury, whether the defendant by his had no right to

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time &c. to wit, on the day and year in the declaration mentioned, gave his opinion between the defendant and the said *Thomas*, of and concerning the said differences, and did thereby give it as his opinion that all right, title, and interest of, in, and to the said undivided third part, in the said avowry mentioned, of the said dwelling-house in which &c. was then of right vested in the said *Thomas*, and not in the said defendant, and that the said defendant had no right, title, or interest therein, or any part thereof, of which said opinion the defendant afterwards, to wit, on the day and year in the declaration mentioned, and before the said time when &c., had notice, and, in pursuance of the said submission, the muniments of the said undivided third part of the house, in which &c., were given up to *Thomas* by the consent and approbation of the defendant. And the plaintiff further saith, that afterwards, to wit, on the day and the year in the declaration mentioned, and before the said time when &c. he with the consent and approbation of the defendant did attorn to the said *Thomas*, and then became and was and from thence hitherto hath been and still is tenant to the said *Thomas* of the said undivided third part of the said dwelling-house in which &c. without this that at the said time when &c. the plaintiff held or enjoyed the said undivided third part of the said dwelling-house, in which &c. with the appurtenances as tenant thereof to the defendant, under the alleged demise thereof in the said avowry mentioned, in manner and form &c.

At the trial before Lord *Denman* C. J. at the Cheshire summer assizes, 1840, it appeared in evidence that in 1835 the plaintiff had been let in as tenant by the defendant of the premises upon which the distress now replevied was made. He paid rent from 1835 to 1838 to the defendant. In 1838 a dispute arose between the defendant and *T. Cooper*, the latter claiming the estate. The property being small, they agreed to take the opinion of a conveyancer upon the construction of a will, upon which the title depended, and to be bound by such opinion. The opinion was

taken, and on the 10th of April, 1838, a meeting took place at the office of the defendant's attorney, at which were present the defendant and *T. Cooper*, when the former admitted that the opinion was against him, and in his presence, and with the consent of his attorney, delivered the title deeds to *T. Cooper*. The latter sent a notice to the plaintiff to pay the rent to him, which he afterwards did, without any interference on the part of the defendant until August, 1839, when the distress, the subject of this suit, was made.

It was objected on the part of the defendant that nothing had been shewn sufficient in law to put an end to the tenancy or convey the reversion to *T. Cooper*. Lord Denman C. J. overruled the objection, giving the defendant leave to move to enter a nonsuit, and left it to the jury to say whether they were of opinion that the defendant had authorised a communication to be made to the plaintiff that he should no longer consider himself as his landlord, and directing him to pay the rent to and become the tenant of *Thomas*. His lordship told them, if they thought so, that the plea was proved, and that they ought to find a verdict for the plaintiff. The learned judge reserved leave to the defendant to move to enter a verdict, and a rule having been obtained,

*Jervis* and *Welsby* shewed cause. The only question in this case was one of fact, and that has been properly determined by the jury. There was evidence that the defendant had authorised his attorney to liberate the plaintiff from the contract of tenancy; and the case is like that of a tenant to a mortgagor, who has been directed by him to pay the rent to the mortgagee.

Where two parties submit a question to a third, his decision upon it has the same effect as a declaration or admission by a person making the submission. This plea is in substance non tenuit, and it was made out. The fallacy of the argument on the other side is in assuming that

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some conveyance was necessary, whereas what was done operates not by way of conveyance, but by shewing that the defendant never had any right, except by the sufferance of *Thomas Cooper*, which estate by sufferance his interference has determined. The decision of the referee, acquiesced in by the defendant, was, that he had no title. The parties referring are bound by the opinion, whether it be right or not: *Price v. Hollis* (a).

*E. V. Williams* contra. It is clear that a term existed between the plaintiff and the defendant; under him the plaintiff entered. The tenancy was confirmed by payment of rent and submissions to distresses. That term being thus created, the title of the reversioner can only be destroyed by a surrender by the tenant, or by an assignment of the reversion. Both are equally out of the question in this case. There was clearly no assignment of the reversion, that can be only by deed, without which an attornment is inoperative. Then was there any surrender? "A surrender is a yielding up of an estate for life, or for years, to him that hath an immediate estate in reversion or remainder (b)." "A surrender of property taken is of two sorts, viz. a surrender in deed or by express words, and a surrender in law wrought by operation of law (c)." A surrender by words is required, by the statute of frauds, to be by note in writing; there is here no such note: a surrender by operation of law may be without writing; but there are here none of the circumstances from which it is to be inferred. *Thomas v. Cook* (d), and similar cases (e), shew what is necessary. In that case there was a notorious change of possession. But here a surrender was clearly never thought of: there was no pretence for saying there was any attempt to surrender to the defendant, either before or after the supposed assignment. It makes no difference

(a) 1 Mau. & S. 605.

(b) Co. Lit. 337 b.

(c) Id. 338.

(d) 2 B. & Ald. 119,

(e) Vide *Rex v. Inhabitants of Stow Bardolph*, 1 B. & Ad. 219.

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that the demise by the defendant was not under seal. If it be contended that there was a surrender, the tenancy now subsisting is a new one by a fresh demise from *Thomas Cooper*, and he could therefore recover the rent from the plaintiff. Suppose he brought an action for the rent, and the counts in the declaration were special, what could it state to shew any title in *Thomas Cooper* against the plaintiff? If it set out the demise by the defendant and an assignment by him, it is clear, if that were not proved, he could not recover, nor could he state any thing to shew that the tenancy was a tenancy newly created after the opinion of counsel was submitted to by defendant. The evidence, however, was never advanced to shew a new tenancy, but to shew that defendant had no title. Nor was there any estoppel, which is so called, "because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth (*a*)."<sup>(a)</sup> There was no act which could have such an effect. At the utmost there was but an abortive attempt to convey the defendant's interest in the premises. No interest passed by any act or instrument, or if any interest did pass, then there is no estoppel (*b*).<sup>(b)</sup> In the case of a demise after a mortgage, supposing the tenant may be permitted to shew that the mortgagee has interfered with the possession given by the mortgagor, and that he is therefore no longer liable to pay rent to him, such evidence would be admissible, because it would shew that the landlord's title, which was at most a tenancy at will, has expired and determined by the act of the mortgagee: *Doe d. Higginbotham v. Barton* (*c*).<sup>(c)</sup>

The circumstances of this case might amount to an authority to the plaintiff to pay rent to *Thomas Cooper*, but there is no plea to admit him into that case.

Lord DENMAN C. J.—I am not sorry that this discus-

(*a*) Co. Litt. 352, a.

(*c*) 3 P. & D. 194.

(*b*) Vide Com. Dig. Estoppel, E. 8.



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sion, upon the point which I reserved at the trial, has taken place, because we are all satisfied that the question might be properly left to the jury to say whether the defendant by his conduct had not deprived himself of all right to recover rent from the plaintiff. The Court concur in the view I took at the trial, that upon the strictest principles of law the defendant's title must be considered as determined. The declaration which he made, or authorised to be made, that the rent was in future to be paid to another, was evidence that the title, by force of which he demised to the plaintiff, was at an end.

WILLIAMS J.—I am of the same opinion. A tenant, though he cannot dispute the title of him under whom he has entered, may shew that the title has been since determined. The acts of the defendant are equivalent to a direct admission by him that his title was at an end.

COLERIDGE J.—I think this case falls strictly within the rule, that the tenant may shew that his landlord's title has expired. The question is whether, upon undisputed facts, the relation of landlord and tenant between the plaintiff and the defendant, has ceased, and I think it had. The defendant must be considered as saying to the plaintiff, my title, good or bad, whatever it was, by which I demised to you, is at an end. Mr. *Williams* put a difficulty in argument, that there had been no sufficient assignment of the reversion, but the correct view of the case is, that there was no reversion to assign, the title of the lessor was determined, and the continued possession was by permission of the real owner, to whom the tenant would be liable for the occupation.

WIGHTMAN J.—I am of the same opinion. No doubt a tenancy did exist between the plaintiff and the defendant, by which the latter could justify a distress, and which the plaintiff would be estopped from disputing, if things had

remained as they were at the time of the defendant's demise to the plaintiff, but I think the declaration which he made himself, or which was made by his authority, amounted to an admission that his title was at an end, and that he claimed title no longer. That a tenant may shew that his landlord's title has determined there can be no doubt: *Gravenor v. Woodhouse* (a) and other cases shew that.

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G.

Rule discharged.

(a) 7 B. Moore, 289.

EVANS v. DAVID REES.

REES, administratrix (in scire facias) v. EVANS.

Tuesday,  
 Nov. 23d.

**RULE** calling on Mr. *Capel Hanbury Leigh* to shew cause why he should not pay *Evans'* costs in the above suits, on the ground that *Evans* was in fact merely his representative in them, and that he was the real party to the litigation. It appeared from the affidavits that this was an action of replevin, in which the question to be tried was what was the true boundary line of two adjoining manors, one belonging to Mr. *C. H. Leigh*, the other to Sir *Charles Morgan*. The debateable land was of the extent of 200 or 300 acres, containing valuable minerals. The parties on the record were respectively tenants of Mr. *Leigh* and Sir *C. Morgan*, and, as it was sworn, persons not of any substance nor having more than a nominal interest in the subject of the suit.

The Court has no power after a judgment for the defendant in a personal action to make a third party pay the costs on the ground that he was the real plaintiff.

It appeared that there had been a former suit between *Evans* and one *Gething*, who was a commoner on Sir *C. Morgan's* manor. This cause was referred, and Mr. *Leigh* and Sir *C. Morgan* became parties to the reference, and, it having been decided in favour of Mr. *Leigh*, Sir *C. Morgan* paid all the costs, in obedience to a decision of Mr. Baron *Alderson*. The present action of replevin was afterwards brought against *David Rees* (deceased since the judgment) for distraining cattle belonging to *Evans*, then depasturing on land awarded on the former reference to belong to Mr.

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*Leigh.* The present rule was granted principally on affidavits which had been made by *Evans* and his attorney, in an early stage of the cause, on an unsuccessful application to change the venue, in which *Evans* disclaimed any real interest in the suit, and the latter swore that he acted solely at the instance and on behalf of Mr *Leigh*, and that he was the real plaintiff. On that motion, a suggestion that *D. Rees* was not defending the suit on his own behalf, was denied by the affidavits in answer. It further appeared that, before the trial of the cause, *Evans'* attorney had offered to give an undertaking to pay the costs, if the verdict should be against him, if *Rees'* attorney would do so also, but the latter declined this proposal.


Sir *W. W. Follett* S. G. and *E. V. Williams* now shewed cause. The Court has no jurisdiction to make such an order as is prayed for. They cannot compel a landlord who brings an action in the name of his tenant to pay the costs. If in an early stage of the cause it is suggested that there is a hardship in allowing the landlord so to bring the action when he is the person who solely has an interest in the event of the suit, the Court, by force of its jurisdiction over the particular cause, may stay all proceedings in it, until security for costs is given. An equitable jurisdiction indeed is sometimes exercised over the proceedings in ejectment, which, as *Bayley* J. said in *Thrustout d. Jones v. Shenton* (a), "for the purposes of justice and convenience, may be said to be peculiarly its own creature." This distinction is pointed out by Lord *Tenterden* in *Berkeley v. Dimery* (b), "In ejectment the tenant in possession *must* be sued, and the Court will not permit a person to put a mere pauper in possession merely to pay the costs." *Hayward v. Giffard* (c) and *Doe d. Wright v. Smith* (d) are also strong authorities to the same effect, and directly in point. (They were stopped by the Court.)

(a) 10 B. & C. 110; S. C. 5 M. & R. 442.  
& R. 443, n.

(c) 4 M. & W. 194.

(b) *Ib.* 113, n.; S. C. 5 M. & (d) 8 Dowl. P. C. 517.

Sir F. Pollock A. G. and Chilton contra. The Court will not allow a party to be virtually a plaintiff in a cause, and protect himself from liability to costs by putting forward a pauper as the nominal plaintiff. There is a difference between the case of a plaintiff and of a defendant. The former spontaneously comes into Court, the latter appears, because called upon to do so by the plaintiff. No case has been cited in which the facts are so strong as in this. All that *Hayward v. Giffard* decides is that interest in the suit will not make a person liable for the costs of it : Mr. Leigh is declared from the first to be the real plaintiff. Every body who puts the process of the Court in motion becomes liable to its jurisdiction to make him pay the costs if he does so improperly. In *Blewitt v. Tregoning* (a) *Littledale J.* admitted the principle now contended for, refusing to exercise it only on the grounds that the facts were not sufficiently strong.

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WILLIAMS J.—We do not think that there is any doubt in this case. I think it is governed by the cases that have been cited on this motion. It is admitted that the defendant might have had his remedy by an application in an early stage in the cause that the plaintiff should give security for costs. I do not attach any importance to the case of *Blewitt v. Tregoning*, in which case it was unnecessary for Mr. Justice *Littledale* to consider what the rule was ; it was enough for his decision that, whatever the rule might be, the facts were not sufficient to call for an application of it. The other authorities are clear and directly in point, particularly *Hayward v. Giffard*.

COLERIDGE J.—A distinction between ejectment and other actions has been established, on which alone Lord *Tenterden* relied. In *Blewitt v. Tregoning* the point was not brought before my brother *Littledale*, nor did the facts require that it should be. The rule is clearly established

(a) 4 Dowl. P. C. 404.

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that the Court has no jurisdiction but over parties before it. This may be a strong case, but it is quite clear that it falls within the general rule. The proper course would have been to apply for security for costs.

WIGHTMAN J.—No case, except in ejectment, has been cited in which a person, not a party before the Court, has been compelled to pay costs. The action of ejectment is an exception to the general rules. On the other side two cases exactly in point have been cited.

G.

Rule discharged.

Thursday
 Nov. 18th.

DOR d. PRIEST v. WESTON.

In proving title in ejectment a deed of conveyance, duly stamped, was produced, which purported to have been executed by power of attorney, but no power of attorney was proved or produced; on the same parchment was a writing bearing a later date, which was a confirmation of the former instrument, and also a substantive conveyance; this instrument was not properly stamped as a conveyance. *Held*, that an additional conveyance stamp was not necessary.

EJECTMENT. At the trial before *Coleridge J.*, at the sittings after last Trinity term, it appeared that this action was brought to recover two houses in Westminster. In proving the title of the lessor of the plaintiff, it became necessary to shew a conveyance by one *Thomas Harding*. To prove this, a deed, bearing date the 28th June, 1817, was given in evidence, which purported to be executed by the said *Thomas Harding*, by *David Slater* by power of attorney. No power of attorney was produced. This deed was properly stamped as a conveyance. *Harding*, before the date of this deed, went abroad. On his return, in 1818, to clear up doubts on the validity of the deed of 1817, a new conveyance was indorsed on the same parchment, which professed also to confirm the title before conveyed. A further stamp of 1*l.* 15*s.* was impressed as applicable to the indorsement. It was proved that the consideration money for the conveyance by *Harding* was between 200*l.* and 300*l.* It was objected that the deed of 1817 passed no title, because execution of the power of attorney was not proved, and that the deed of 1818 was

inadmissible, because it was not properly stamped with the ad valorem stamp of 2*l*. The learned judge overruled the objection, but reserved leave to the defendant to move to enter a nonsuit.

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Humfrey now moved accordingly^(a). The stamp affixed in 1817 could not be made available for the deed executed on the same parchment subsequently. They were distinct deeds, and whether or not *Harding* really gave a power of attorney is quite immaterial for the determination of the question whether the stamp was expended or not. No power of attorney was proved, it is true, but the instrument on the face of it appeared to be valid, and it expended a stamp, whether it passed any interest or not. If a bill of exchange were drawn by procuration, the stamp would be thereby used, though the actual drawer might have no authority.

Cur. adv. vult.

Lord DENMAN C. J., now delivered the judgment of the Court.—In this case the question arose as to the admissibility of a deed under peculiar circumstances, which was contested for want of a proper stamp. The original deed of conveyance purported to have been executed by power of attorney. The power of attorney was not produced. A year after the execution of the first deed, another deed for conveyance of the same property was indorsed by way of confirmation. This deed of confirmation was objected to, on the ground that it had no ad valorem stamp. We think this was not necessary. A proper ad valorem stamp was impressed on the first deed. This satisfies the statute, and no such stamp was necessary to the second deed, as it was not a present conveyance of any value.

G.

Rule refused.

(a) On Friday, November 5th, before Lord Denman C. J., *Williams and Coleridge Js.*

1841.

Tuesday.
Nov. 10th.

Under a plea in detinue, denying the plaintiff's property, a lien may be given in evidence.

LANE v. TEWSON.

DETINUE of goods. Plea, that the said goods, &c. were not the goods of the plaintiff.

At the trial before *Parke B.*, at the last assizes for the county of Lincoln, the defendant contended that he had a lien upon the subject of the action for his charges as an auctioneer. It was objected, on the part of the plaintiff, that this defence was not admissible under the plea. The learned baron reserved leave to the plaintiff to move to enter a verdict for him on this objection, if the opinion of the jury should be adverse upon the question, which he left to them, of the fact of the lien. The jury having found a verdict for the defendant,

Balguy (a) now moved to enter a verdict for the plaintiff, pursuant to leave reserved. He cited *Richards v. Frankum* (b) as an authority that in detinue a lien must be specially pleaded.

Cur. adv. vult.

Lord DENMAN C. J., now delivered judgment.—The question in this case was, whether in detinue, under a plea denying that the goods were the plaintiff's, a lien could be set up. We think that the learned judge ruled rightly that it might. A similar point has been already decided in an action of trover.

G.

Rule refused.

(a) On Friday, November 5th, before Lord Denman C. J., *Williams, Coleridge and Wightman Js.*
(b) 6 M. & W. 420.

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Wednesday,
Nov. 17th.

The QUEEN v. FOUCH and another.

UPON an appeal against an order of justices in special sessions, under the stat. 50 *Geo.* 3, c. 49, disallowing three items in the accounts of the defendants, as overseers of the poor of the parish of Warfield, the Berkshire quarter sessions confirmed the order of disallowance, subject to the opinion of this Court upon a special case, in which the following facts were stated.

The parish of Warfield, which was in the East Hampstead union, was valued under the provisions of the Parochial Assessment Act, 6 & 7 *Will.* 4, c. 96, s. 3, by a surveyor. His valuation, having been objected to, was sent back to him; he made some alterations in it, but it was still disapproved of, and the parish refused to adopt it. After this the defendants and the other parish officers made a new valuation on their own responsibility, and made a poor's rate on that valuation. Notice was given by the parish officers that this new assessment was made, and several persons inspected, and made no objection to it. The defendants subsequently made a rate upon this assessment. The rate was appealed against at the special sessions, under 6 & 7 *Will.* 4, c. 96, s. 6, on the grounds of inequality, unfairness, and incorrectness in the valuation. The defendants attended on that appeal, with their solicitor, and supported the rate by evidence, but, after evidence heard on both sides, the justices in special sessions made alterations in the assessment of ten of the persons rated, some of them being raised and others lowered, but in some of the instances to a small amount only; and the justices in special sessions directed that the parties in the appeal should each pay their own expenses, and pay the amount of the fees of the magistrate's clerk in equal moieties. For the expenses incurred on the hearing of this appeal, the overseers inserted the following items in their accounts:—

Although parish officers cannot abandon a poor rate, after it has been allowed and published, so as to render it no longer a subsisting rate, yet they may so far abandon it as to refuse to incur expense in supporting it on appeal; and they have no right, as matter of law, independently of the discretion of the justices, to have the expense of contesting such an appeal allowed them in their accounts.

| | | | | |
|-----------------------------------------------------------------------------------|------------------------------------------|-------|----|----|
| 1841. | | £ | s. | d. |
|  | To Mr. <i>Trumper</i> , land surveyor . | 32 | 11 | 10 |
| The QUEEN | To <i>Francis Hawkes</i> , land surveyor | 31 | 0 | 0 |
| v. | To <i>Charles Cave</i> , solicitor . . . | 21 | 16 | 10 |
| FOUCH. | | <hr/> | | |
| | | 85 | 8 | 8 |
| | | <hr/> | | |

These items were allowed by the auditor of the union, and at a vestry meeting held afterwards the majority of the parishioners then present resolved that these expenses should be allowed. The defendants afterwards attended with their accounts before the justices in special sessions, under the stat. 50 *Geo.* 3, c. 49, when the above-mentioned items were objected to, and were ordered to be disallowed. —Against this order of disallowance so made at the special sessions, the overseers had appealed to the quarter sessions, who confirmed the order of disallowance made at the special sessions, subject to the opinion of this Court on a special case, in which the question stated was, whether the said sum of 85*l.* 8*s.* 8*d.* ought to have been allowed to the then appellants, as overseers, under the circumstances above stated, if it ought, the said order should be quashed, if it ought not, the same to be confirmed.

Carrington (with whom was *Bros*) appeared in support of the order of sessions. [*Williams J.* Is this not a matter for the discretion of the justices at quarter sessions, and have they not exercised that discretion?] He was then stopped.

Tyrwhitt contra. The court of quarter sessions have stated all the facts upon the case, and have in effect asked for the assistance of this Court upon those facts, and suspended their own judgment. This Court has often in such cases reviewed the whole matter, *Rex v. Ardington* (a). [Lord Denman C. J. When we see that the sessions are clearly wrong, and they submit a case for our considera-

(a) 1 A. & E. 260; 3 N. & M. 304.

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tion, we take it to be a conditional decision.] The appeal at the special sessions, at which the disallowed items of expense were incurred, was an appeal against a poor-rate, which the overseers were bound to make, *Reg. v. Earl of Yarborough*(a); and the items were items of expense necessarily incurred by them in their official capacity, and should therefore be allowed in their accounts. In *Rex v. Gwyer*(b), *Taunton J.* says, that the overseers are entitled to charge in their accounts whatever they have spent "for the costs of maintenance or removal, or of an appeal, though decided against them, unless they have been guilty of gross misconduct, or of neglecting to consult the vestry as to the propriety of proceeding in it when there was convenient opportunity, in repaying the legal disbursements of constables, and all other money fairly laid out in the business of the parish." No misconduct is imputed to the defendants, and these very items were allowed by the auditor of the union, and by the vestry of the parish. [*Coleridge J.* Must not the right of the overseers to have their costs allowed them out of the parish funds depend on the circumstances of each particular case, and who can be so fit to decide as the magistrates, who have the whole matter before them? Your argument must go to this, that, however careless the overseers are, they are entitled to have their costs paid by the parish.] The overseers are placed in a difficult position; they cannot abandon a rate, *Rex v. Justices of Cambridge*(c), and yet they may be called upon to pay out of their own pockets the expense of shewing that they made the rate as correctly as they could. [*Lord Denman C. J.* The meaning of that case is, not that the parish cannot in effect abandon a rate, but that their abandonment cannot prevent its being an existing rate.] The only charges here are those of the attorney and the surveyors, and they ought to be defrayed from the parish purse as much as the expenses of litigating a parochial settlement, which Lord

(a) 3 P. & D. 491.

(c) 2 Ad. & E. 370; 4 N. & M. 238.

(b) 2 A. & E. 227; 4 N. & M. 158.

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Kenyon C. J. says, in *Rex v. Essex* (a), "have always been paid by the parish officers, out of the parish stock;" and his lordship also says, "the proposition therefore on which I rely is this, that wherever a duty is imposed on a county, and where costs incidentally and necessarily arise in questioning the propriety of acts done to enforce that duty, the magistrates, who have the superintendence over the county purse, have necessarily a right to defray such expenses out of the county stock." The same principle applies here, and the uniform practice is in favour of it.

Lord DENMAN C. J.—This is a case in which I think the sessions have exercised a sound discretion, the question before them being, whether the costs of these parish affairs were to be visited upon the parish or not. I think that the parish officers were not justified in endeavouring to cast a useless expense upon the parish. Overseers have no right to litigate every case at the expense of their parish, and it ought to be generally known and understood that, if public officers will get into unnecessary litigation, they will not be allowed to charge their expenses to the parish. The meaning of the decision in *Rex v. Justices of Cambridge* is, that an abandonment of a rate after allowance will not prevent it from being still an existing rate, but, although, therefore, overseers cannot so far abandon a rate as to make it void, yet they are bound to do so under certain circumstances so far as they can, namely, to the extent of not bringing witnesses, or incurring expenses to support it. The only point of law upon which our opinion can be supposed to be asked in this case is, whether the quarter sessions were bound to allow these items in the accounts, which they clearly were not.

WILLIAMS, COLERIDGE, and WIGHTMAN Js. concurred.

D.

Order of Sessions confirmed.

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The QUEEN v. EASTERN COUNTIES RAILWAY COMPANY.
(On the Prosecution of JOHN COLLINGRIDGE.)

Saturday,
Nov. 13th.

MANDAMUS to the defendants, commanding them to issue their warrant to the sheriff to summon a compensation jury.

The writ, after reciting portions of the 1st, 9th, 28th and 29th sections of the Company's act (6 & 7 Will. 4, cap. cvi.), and that Mr. *Collingridge* was interested in a certain leasehold estate, situate on the west side of the road leading from Bow to Old Ford, in the parish of St. Mary, Stratford, Bow, Middlesex, proceeded thus :

" And whereas before and at the time of the sustaining of the damage, loss and injury hereinafter mentioned, part of the land of the estate was bounded on one side thereof by a certain public *road* or highway, called or known as the Fairfield Road, and was *on a level with the same*. And whereas the said Company, in making the said railway, and in the execution of the works so authorised to be done by

By sect. 9 of the Eastern Counties Railway Act (6 & 7 Will. 4, cap. cvi.), the Company are empowered to raise or lower roads, in order more conveniently to carry the same over or under or by the side of the railway, making satisfaction " *in manner hereinafter mentioned, to all persons, &c. interested in any lands which shall be taken, used or injured, for all damages.*"

By sect. 28, the owners of lands through which the railway is to be made, may agree to accept satisfaction for the value of such lands, and also compensation for any damage by them sustained by the severing or dividing of such lands, or for any damage sustained by the taking thereof, or by reason of any of the works authorised, and if such parties and the Company shall not agree as to the amount of such purchase-money, satisfaction or compensation, the same is to be ascertained by a jury, as "*hereinafter is directed.*"

By sect. 29, " for settling all differences which may arise between the said Company and persons interested in any lands which shall or may be *taken, used, damaged or injuriously affected* by the execution of the act," it is enacted, " that, if any of the parties entitled to receive *such* purchase-money, satisfaction, recompence or other compensation as aforesaid, shall refuse to accept *such* purchase-money, satisfaction, &c. as shall be offered by the Company," a jury is to be summoned in the manner provided, " and such jury shall inquire of and give a verdict for the sum to be paid for the purchase of *such* land, and also the sum to be paid by way of satisfaction, recompence, &c. either for damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands, whereof any such person as aforesaid shall be seized," &c. " which satisfaction, recompence, &c. for such damage or loss shall be inquired into and assessed *separately from the value of the land so to be taken or used as aforesaid.*"

Held, although the directions by sect. 29, as to the finding by the jury, applied in terms to compensation for such land only as should be "*taken*," and to the ulterior damage consequent upon such taking, yet that the clause extended also to a case where the land of a party had not been "*taken*," but had been "*injuriously affected*" by the lowering of a road in front of such land, the access to which was thereby impeded.

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them as aforesaid, and in order to carry the said railway over the said *road*, have altered and *lowered* the same to a great depth in front of a great part, to wit, in front of 290 feet of the said land of the said *John Collingridge*, and thereby the said land hath been and is greatly injured and deteriorated in value, and the access thereto from the said road has been greatly impeded, and by reason of the declivity from the said land to the said road it hath become necessary to make additional fences to protect and keep in cattle depasturing in the said land, and to cut down and level certain parts of the said land against the said road, for the beneficial enjoyment and occupation of the same, and the said *John Collingridge* hath been and is by reason of the premises otherwise greatly injured and damnified. And whereas the said *John Collingridge* hath sustained great damage, loss or injury in his said estate, by reason of the matters and things hereinbefore mentioned, and otherwise by reason and in consequence of certain works done by you the said Company in the execution of the powers by the said act granted. And whereas the said *John Collingridge*, under the provisions of the said act of parliament, was and is entitled to accept and receive recompence and compensation from you the said Company for the damage, loss and injury sustained by him by the means aforesaid."

The writ then went on to state the necessary formal matters as to notice of the damage &c., and concluded by calling on the Company to issue a warrant to the sheriff of Middlesex, &c. commanding him to impanel a jury in the manner directed by the said act, for the purpose of inquiring of, assessing, and giving a verdict for the sum of money to be paid by the Company to Mr. *Collingridge*, by way of recompence or compensation for the damage sustained by him.

The material parts of the return were the following: "That we have not, under any of the powers and provisions of the before mentioned act of parliament, entered into and upon the lands and premises and leasehold estate in the said writ mentioned, and of which the said *John Colling-*

ridge is therein stated to be possessed, nor on any part or portion thereof; nor have we set out and appropriated them, nor any part nor portion of them, for the purposes of the said railway; nor have we taken nor used the same, or any part thereof; nor (following the language of the 9th section, as to the powers of the Company in dealing with the necessary lands) have we cut, embanked, soughed or removed or laid on, nor have we used or manufactured any earth, stone, trees, gravel or sand, or any other materials or things whatever, in and upon or out of the said lands, premises and leasehold estate of the said *John Collingridge*, nor in and upon or out of any part or portion thereof, in the execution of the powers of the said act, for the making, maintaining, altering, repairing or using the said railway or other our works; nor have we made or constructed any works whatever in over or upon the said lands and premises and leasehold estate, or any part thereof, under the powers and provisions and in the execution of the said act or otherwise. And we do further &c. return that the said *John Collingridge* is not the owner or occupier of any lands through, over or upon which the said railway, or any other works connected therewith are made or constructed, nor of any lands taken or used by us the said Company, in execution of any of the powers granted by the said act. And we do further most humbly certify and return, that for the causes and reasons above set forth, and because it is not stated and shewn to us the said Company, nor is it stated and shewn in the said writ by the said *John Collingridge*, that his lands or estate or premises *have been entered upon or touched or taken or used*, or in any manner interfered with by us the said Eastern Counties Railway Company, in the execution of the powers of the said act, that we have not issued our warrant to the sheriff of the county of Middlesex, for the purpose in the mandatory part of the said writ mentioned, in manner and form as by the said writ we are commanded."

The case was now argued after a concilium (a).

(a) Before Lord Denman C.J., Williams, Coleridge and Wightman Js.

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Butt, for the prosecution, cited *Thicknesse v. The Lancaster Canal Company* (a), *Rex v. The Commissioners of the Navigation of Thames and Isis* (b), *Bell v. The Hull and Selby Railway Company* (c), *Rex v. The Commissioners for Improvement of the City of Exeter* (1837). (d)

Sir *W. W. Follett* S. G. contra, cited *The Governor and Company of the British Cast Plate Manufacturers v. Meredith* (e), *Boulton v. Crowther* (f), *Rex v. The London Dock Company* (g), *Lord Oakley v. The Kensington Canal Company* (h). [Lord Denman C. J. It is not very satisfactory to hear that case cited, as I am afraid we there gave effect to fraud.]

The rest of the argument is embodied in the judgment of the Court. The sections principally referred to were the 9th, 28th, 29th, and 36th (i).

Cur. adv. vult.

(a) 4 M. & W. 472.

(b) 5 A. & E. 804.

(c) 6 M. & W. 699.

(d) Not reported.

(e) 4 T. R. 794.

(f) 2 B. & C. 703; S. C. 4 D. & R. 195.

(g) 6 N. & M. 391.

(h) 5 B. & Ad. 138.

(i) Sect. 9 authorised the Company "to divert or alter the course of any rivers, or streams of water, roads or ways, or to raise or lower any such rivers or streams, roads or ways, in order the more conveniently to carry the same over or under, or by the side of the said railway," &c. "they, the said Company, their agents and workmen doing as little damage as may be, &c., and the said Company making full satisfaction in manner hereafter mentioned to all persons and corporations interested in any

lands which shall be *taken, used, or injured, for all damages* by then sustained, in or by reason of the execution of all or any of the powers hereby granted."

The 28th sect. enacted, "That all persons, corporations and other parties by this act capacitated to sell and convey any lands, or to enfranchise lands of copyhold or customary tenure, or to release lands from rents and other incumbrances charged thereon, and the respective owners and occupiers of any lands through, over, or upon which the said railroad or other works hereby authorised, are intended to be made, or of any share, estate, or interest in such lands, may agree to accept and receive, and may (subject to such restrictions as in this act are contained as to the payment thereof,) accept and receive satisfaction or

Lord DENMAN C. J., on a subsequent day in this term (Nov. 24) delivered the judgment of the Court.—This question comes before us upon a return to a mandamus, directing the Eastern Counties Railway Company to inquire into the injury alleged to have been sustained by the applicant, by reason of the lowering of a certain highway adjoining his land in the course of constructing their said railway. The return states in substance that the said Company have not “touched, taken, or used” any land belonging to the applicant, and, therefore, the said Company

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recompence for the value of *such* lands, or of the interest therein by them conveyed, and also compensation for any damage &c. by them sustained by reason of the severing or dividing of *such* lands, or by the apportionment or release of rents, and also for and on account of any damage, loss, or inconvenience which may be sustained by *such* persons, corporations, or other parties, by reason of the *taking* thereof, or by reason of any of the works by this act authorised, or of the execution of the powers hereby granted in such gross sums as shall be agreed upon between the said owners (including persons hereby capacitated as aforesaid) and occupiers respectively and the said Company, and in case the said Company and *such* parties respectively shall not agree as to the amount or value of such purchase monies, satisfaction, recompence, or compensation, the same respectively or either of them, concerning which they do not so agree, shall be ascertained and settled by the verdict of a jury (if required) as *hereinafter directed*.”

The 29th sect. is sufficiently recited in the judgment of the Court.

The 36th section enacted, “That the said Company shall not be obliged, nor shall any jury to be summoned by virtue of this act be allowed (without the consent of the said Company) to receive or take notice of any complaint to be made by any party for any loss or injury by him sustained, or supposed to be sustained, in consequence of the execution of any of the powers of this act, unless notice in writing, by or on behalf of the corporation or person making such complaint, stating the nature, extent, and particulars of such loss or injury, and the amount of the compensation claimed in respect thereof, shall have been given by such corporation or person to the said Company ten days before the summoning of such jury, and within the space of six calendar months after the time of such supposed loss or injury having been sustained, or after the sustaining, doing, or committing thereof shall have ceased, so that the said Company shall not be chargeable with or liable to any amount of continuous damage for any time exceeding six years prior to the making of such claim and giving such notice.”

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contend that they are not liable to make any compensation.

In the course of the argument various cases were cited ; but, at length, it seemed to be agreed (and we think rightly) that this case must be decided upon the provisions of the particular act applicable to it, as the decision, in the cases quoted, was upon the acts applicable to each.

The point in controversy between the parties is, whether the compensation clause in this act (6 & 7 Will. 4, c. 106, entitled "An Act for making a Railway from London to Norwich and Yarmouth by Romford and Chelmsford and Ipswich, to be called the Eastern Counties Railway") be large enough to include the case of this applicant, none of whose land has been taken, or in any manner used by the said Company. And before we advert to the provisions of this particular act, we think it not unfit to premise that, where such large powers are intrusted to a Company to carry their works through so great an extent of country, without the consent of the owners and occupiers of land through which they are to pass, it is reasonable and just that any injury to property, which can be shewn to arise from the prosecution of these works, should be fairly compensated to the party sustaining it. It is also observable that no question arises upon the clause (sect. 9) which empowers the Company to conduct their undertaking ;—their powers being not only to take land, but also "to alter, raise, or lower roads or ways," for their convenience, making full satisfaction *in manner hereinafter mentioned*, to all persons interested in any lands which shall be taken, used, or *injured*, for all damages by them sustained by reason of the execution of the act." Upon which clause it is important to remark, first, that it in terms comprehends cases of injury, independent of *taking land* ; and next, that it is assumed that the satisfaction to be so made (which, if the parties cannot agree, *must* refer to the compensation clause) is to extend to all the cases of injury enumerated, one of which, as we have just observed, is injury to *any* person, whether his

land be taken or not. It is observable also, (if the language of the section we have commented upon had been in any degree doubtful) that the 36th also plainly refers to cases wherein a jury may be summoned to inquire into "loss or injury occasioned by the execution of the act," without any mention of the taking of land, provided a certain notice by the claimant has been previously given.

It now remains for us to consider (and upon this part of the case the chief reliance was placed on behalf of the Company) whether, although the alleged injury be within the 9th section, and it is there assumed that such injury is within the compensation clause, the language of the compensation clause itself is so restricted as necessarily to exclude it. The language of it (section 29) is, so far as it concerns the present question, to the following effect:—
 "And for settling all differences which may arise between the said Company and persons interested in any lands which shall or may be taken, used, *damaged*, or *injuriously affected* by the execution of the act," it is enacted (amongst other things), that "if any of the parties entitled to receive such purchase money, satisfaction, recompence, or other compensation *as aforesaid*, shall refuse to accept such purchase money, satisfaction, recompence, or other compensation as shall be offered by the said Company," a jury is to be summoned in the manner therein specially provided. "And such jury shall inquire of and assess and give a verdict for the sum to be paid for the purchase of such lands, and also the sum to be paid by way of satisfaction, recompence or compensation, either for the damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands, whereof any such persons as aforesaid shall be seised, possessed of, or interested in." Then follows, "which satisfaction, recompence, or compensation for such damage or loss, shall be inquired into and assessed separately from the value of the lands so to be taken or used

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as aforesaid, and the sheriff or other person shall give judgment accordingly."

Now it must be admitted, with reference to this part of the section, that what the jury is specially directed to find is applicable to the case of land taken, and of some ulterior damage thereupon: and the argument is, that, because that precise injury is specially provided for, all others are virtually excluded. On the other hand, it is to be observed, that the words "damaged or injuriously affected" *may*, and we think ought, where the intention is so previously expressed, to extend to injuries mentioned in the 9th section, and to this injury amongst the rest. We also think that the words, "if any of the parties entitled to receive such purchase money, recompence, or other compensation *as aforesaid*," do not necessarily refer to the preceding (the 28th) section alone, supposing that to apply to those persons only whose land has been taken, but that it may apply to cases plainly mentioned in the 9th section, and may therefore include this. We also think that, where the purpose to give compensation in such a case has been so clearly expressed, every fair intendment ought to be given to effectuate that intention. We have, therefore, not only in other parts of the act, but in the compensation clause itself, injuries mentioned, to which the direction to the jury, as to the finding for the value of the land, and further damage to the person whose land has been actually taken, is inapplicable.

But when we see that it is expressly declared in the 9th section that an injury like the present is provided for in the compensation clause (the 29th), and that the language in the earlier part of that clause itself is large enough to embrace it, we think that we ought not to defeat so plain and reasonable an intention of the legislature, because the direction as to the finding of the jury is applicable to a different case: in the present, the inquiry of the jury would be confined to the amount of damages (if any have been sustained), and to that only.

Before we conclude, we shall briefly advert to an argument much pressed upon us—that, if we make this rule absolute, *any* injury to land, at any distance from the line of railway, may become the subject of compensation. If extreme cases should arise, we shall know how to deal with them; but, in the present instance, the alleged injury is to land adjoining a road, which has been “lowered” under the provisions of the act, and is, therefore, land “injuriously affected” by an act, expressly within the powers conferred upon the Company.

The return, therefore, being insufficient, a peremptory mandamus must be awarded.

Peremptory mandamus.

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The QUEEN v. The Inhabitants of RISHWORTH (a).

ON appeal, to the West Riding Quarter Sessions, against an order for the removal of *Elizabeth Bottomley &c.*, from Rishworth in the said riding, to Stayley Bridge in Cheshire, the sessions quashed the order subject to a case:

The case set out the examination of the pauper, on which the order was made. The following was the material part of her examination, “I am twenty eight years of age, and was born illegitimate at Stayley in Cheshire.”

The following evidence of a pauper, “I was born illegitimate at S.,” being necessarily hearsay evidence, is insufficient to sustain an order of removal.

The grounds of appeal applicable to this part of the case were, “that no legal evidence of a birth or settlement in our township of Stayley is disclosed in the examination, upon which the order is made, such evidence being only hearsay. That the said order of removal, and the examination on which the same was made, are bad upon the face thereof.”

On hearing the appeal the respondent’s counsel stated, in opening their case, that evidence would be given of the pauper having been born illegitimate in Stayley. The counsel for the appellants objected, that the examination of

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the pauper, whereon alone the order of removal had been made, disclosed no legal evidence, and was not sufficient to let the respondents into any evidence of the pauper having been born illegitimate in Stayley, or of any other settlement of the pauper in Stayley. The question of the admissibility of the evidence was then argued, and the Court thereupon decided, that the examination, whereupon the order had been made, was not sufficient to let the respondents into such evidence.

The question for the Court of Queen's Bench was, whether the pauper's examination was sufficient to let the respondents into evidence of the pauper having been born illegitimate in Stayley, or of any other settlement of the pauper in Stayley. If the Court should be of opinion that the examination was sufficient to let the respondents into such evidence, the appeal to be reheard.

Wortley and *Monteith*, in support of the order of sessions, contended that the order of removal was bad, as having been made on hearsay evidence of the place of birth, and relied upon *Reg. v. Ecclesall Bierlow* (a) and *Reg. v. Lydeard St. Lawrence* (b).

Baines and *Pashley* contra. It is contended, without asking the Court to revive *Rex v. Kelvedon* (c), that the true doctrine, applicable to the subject under consideration, is to be found in *Rex v. Justices of Derbyshire* (d). In that case, which has been followed by *Reg. v. Bridgewater* (e), it was held that a ground of appeal, relying upon a settlement by hiring and service, must give particulars, such as the date of the service and the name of the master, so as to afford opportunity to the other side, of inquiring into the truth of the alleged settlement.

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| (a) 11 A. & E. 607; S. C. ante | & P. 138. |
| 160. | (d) 6 A. & E. 885; S. C. 1 N & |
| (b) 11 A. & E. 617; S. C. ante | P. 703. |
| 191. | (e) 10 A. & E. 693; S. C. ante |
| (c) 5 A. & E. 687; S. C. 1 N. | 265. |

The same doctrine is to be applied to the examination on which an order of removal is made; the particulars of the settlement must be given. No more is necessary; the *evidence* on which the order is made is immaterial, for the order may ultimately, on the trial of an appeal, be sustained by entirely fresh evidence. In *Reg. v. Middleton in Teusdale* (a) the examination was bad, for it set up a settlement by renting, and did not shew a renting for any specified period, or of any specified date; there were therefore neither *ground* of removal, nor *particulars* of the alleged settlement. *Reg. v. Ecclesall Bierlow* (b) may be supported on the doctrine of *Rex v. Justices of Derbyshire* (c), without reference to the new doctrine of excluding hearsay evidence, for in *Reg. v. Ecclesall Bierlow* (b) the hearsay evidence given by the pauper was, "the place of my father's settlement, as I have heard him say, and believe to be true, is at Ecclesall Bierlow,"—without any particulars of the settlement. In *Reg. v. Lydeard St. Lawrence* (d) it is to be observed that the justices took the hearsay evidence of the pauper's husband as to the place of his birth, although his father was before them, who could have given direct legal evidence of the fact, and this is commented upon in the judgment of *Patteson J.* And in both the last mentioned cases the examination shewed in terms, that the witness spoke from hearsay evidence, but here the pauper speaks *directly* to the fact, which may become known to her by legal evidence, such as an admission by the appellant parish. Where the examination supplies all the *essentials* of a settlement, so as to shew a legal ground of removal, and supplies also so many *particulars* of the settlement as will give convenient means of ascertaining its truth, then, it is submitted, the examination is sufficient, although it contains nothing but hearsay evidence.

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(a) 10 A. & E. 688; S. C. 3 P. & D. 473.

(b) 11 A. & E. 607; S. C. ante 160.

(c) 6 A. & E. 885; S. C. 1 N. & P 703.

(d) 11 A. E. 617: S. C. ante 191.

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If it had been intended by the Poor Law Amendment Act, that the removing justices should act upon strict legal evidence only, some provision would have been made to enable them to compel the production of such evidence, and to allow the costs attendant upon it. The costs of the proceeding may frequently be very great, if conveyances and indentures are to be produced, properly stamped, from any remote part of the country, or the originals to be accounted for, before secondary evidence can be received; and, after all, the appellants will not be in full possession of the case against them, unless all documents or copies in support of the settlement are sent with the order. [*Patteson J.* Twenty one days are allowed to the parish on which the order is made to determine whether they will appeal or not. The rule now proposed to us would throw the burden of an expensive inquiry upon the wrong parish.]

It was then contended that hearsay evidence was admissible of the place as well as of the time of birth, and 1 *Phillipps* on Evidence p. 225-6 (a) and the cases collected in the notes, and *Crease v. Barrett* (b) and *Whitelocke v. Baker* (c) were referred to. [*Wightman J.* It was expressly held in *Rex v. Erith* (d) that hearsay evidence of the place of birth will not do.] That decision seems to be disapproved of in 1 *Phillipps* on Evidence, p. 226.

Lord DENMAN C. J.—This appeal depends upon the sufficiency of the examination. Distinct notice has been given of the particular objection to it. In the first place, does this examination shew the order of removal to have been made upon hearsay evidence within the cases lately decided? Of that there can be no doubt—the pauper speaks to that which cannot be within her own knowledge, viz. to the fact of her having been born illegitimate at a particular place. The question therefore comes to this, are

(a) 8th ed.

(b) 1 C. M. & R. 928.

(c) 13 Ves. 514.

(d) 8 East, 539.

those cases rightly decided? On that point also I have no doubt, though I am glad the matter has come before us again, because the conclusion we came to was new, and may be attended with some inconvenience; but I think the balance of inconvenience is the other way. The Poor Law Amendment Act has not introduced any change into the kind of evidence upon which removals may be made, but, by requiring the examination to be handed over to the parish removed to, has laid open the evidence, and made it necessary for us to determine whether an order resting upon no legal evidence is good. I think an order of removal and any other order of justices is invalid if not founded on legal evidence. The parish to which the pauper is removed has a right to say, "Why have you sent us a pauper to maintain when there is no legal evidence that he belongs to us?" If any kind of hearsay evidence is receivable, I do not see why it should not be enough for the pauper to say, "I have heard that I am settled" in such a parish; for even then some ingenious suggestion may be offered that under certain possible circumstances the statement was legal evidence. Undoubtedly the practice has hitherto prevailed of removing paupers upon very loose evidence, but still, whatever the practice may have been, when once such proceedings are brought into Court they must be tested by legal principles. There may certainly be some difficulty in bringing documents, subscribing witnesses and so forth, before the removing magistrates, and, perhaps, the legislature would act wisely if it made some provision on the subject. But if the examination is to give no information the chance is taken of an appeal. With regard to costs, if previous information is given to the appellants, then they should pay costs if they go on perversely; but why should they pay the costs, that have been referred to, of the preliminary *ex parte* inquiry before the removing justices? It seems to be supposed that there is some inequality if the appellants are to give the grounds only of appeal, and the respondents to give the examination. But the examination is that upon

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which the respondents themselves act, and they can furnish it without inconvenience. They are required by the terms of the statute to furnish the examination, and the appellants to furnish the grounds only of their appeal. We think we do a benefit to the public by adhering to our former decisions on this subject, and by declaring that for the future there must be no doubt that an order of removal is to be obtained on legal evidence.

PATTERSON J.—I have no doubt that the evidence on which the present order has been made was not legal evidence. Even if there were no distinction between the admissibility of evidence of the time and of the place of birth, yet here the pauper's evidence of the time of her birth would be inadmissible, it would not do at the sessions, it would be nothing.

As to the general question, the strongest objection, on the score of inconvenience, relates to the production of title deeds, indentures, and subscribing witnesses. There is certainly no provision in the statute for the costs of bringing such evidence before the removing justices. But then the probability of an appeal is lessened by requiring such legal evidence, as an opportunity is thereby afforded to a parish of exercising a sound discretion whether to appeal or not. Suppose, in the case of a settlement by apprenticeship, the pauper to say, "I was bound apprentice to such a person in such a parish:" are the appellants to hunt out the indenture and the subscribing witnesses? Obviously the onus would be thrown on the wrong party. Whether the inconveniences of our decision are so great as to render it expedient for the legislature to interfere, I do not know, but I am satisfied that our decision is the only one we could come to on legal principles. If, after the objection is pointed out to their order the respondents feel that they are wrong, they may probably, after notice to the other parish, be able to abandon it and get another made on legal evidence. I believe in one case in the crown paper the question will

arise whether such an order can be abandoned (a). I do not see how the act is to be carried into effect without requiring legal evidence in these cases.

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COLERIDGE J.—I am of the same opinion, and agree with my lord that it is well this question has been again brought before us, and trust that henceforth all doubt will be at an end.

Three points have been raised. First, it is said, this case is distinguishable from the cases which are supposed to govern it; secondly, that the evidence here was legal evidence; thirdly, that the former cases ought to be reconsidered.

1. As to this case being distinguishable. In one of the former cases the examination was certainly open to the farther objection pointed out; but still the decision is not put on that objection, but on the objection we have now to dispose of. The other case is not distinguishable; there the evidence was hearsay in terms, and here it must of necessity have been so in fact.

2. Was there legal evidence in this case, of the place of birth: *Rex v. Erith* (b), which was a well considered case, decides that hearsay evidence of the place of birth is inadmissible.

3. Were the former cases rightly decided? My opinion on this subject may be entitled to some weight, because I always felt the inconvenience that would result from those cases. But I am satisfied, by the reasoning of my lord and my brother *Patteson*, that those cases were rightly decided, and, though inconvenience may be the result, that the inconvenience would have been greater if we had decided otherwise. And the act in some measure remedies the inconvenience by suspending the actual removal for twenty-one days, during which the objection to the examination may be

(a) See *Reg. v. The Justices of the West Riding*, post, 630. (b) 8 East, 539.

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pointed out. By our decision we merely carry out the old law, for an order might always have been quashed if bad on its face, and, if it had been the practice to set out the grounds in the order itself, the order might always have been set aside, if those grounds were insufficient. The only change is that now the examination must be sent with the order, and thus the grounds are open to immediate objection.

WIGHTMAN J.—I am unable to distinguish this case from the two former cases, and think that, if we had decided otherwise than we have, the object of the act would be defeated. That object appears to have been the prevention of litigation and expense, by compelling in the outset a mutual disclosure between the contending parishes. In the present instance, the weakness of their adversary's case became known to the appellants by the new system of sending the examination with the order of removal. Independently of the distinction laid down in *Rex v. Erith* (a), that the same hearsay evidence that would be sufficient to prove the time, is insufficient to prove the place of birth, the evidence in this case would not be admissible to prove the time. For in all cases the declarations as to time of birth have been made by those who would know the fact, and here it is proposed to allow the evidence of a person who could not know the fact.

D.

Order of Sessions confirmed (b).

(a) 8 East, 539.

(b) See the next case, *Reg. v. Stapleford Fitzpaine*.



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FITZPAINE (a).

ON appeal against an order of two justices, removing *Betty Hake* and her four children, from the parish of Stapleford Fitzpaine in the county of Somerset, to the parish of Buckland in the same county, as the place of the last legal settlement of *Sander Hake*, deceased, formerly husband of the said *Betty Hake*, and father of her children, the sessions quashed the order, subject to the opinion of the Court of Queen's Bench on the following case:

The examinations upon which the order of removal was made were as follows:—The examination of *Betty Hake*, who saith as follows: "I am the widow of *Sander Hake*, late of Stapleford Fitzpaine aforesaid, labourer, deceased. I was married to the said *Sander Hake* in the parish church of Buckland St. Mary about sixteen years ago. On my marriage I went to live with my husband on an estate at Blindmore, in the said parish of Buckland St. Mary, who resided with his father and was carter to him. After we had lived there about a year, my father in law was burnt out of the estate, upon which he went to Stapleford Fitzpaine, and I and my husband went to Curland, and lived there with my father and mother. My husband never rented 10*l.* a year afterwards. My husband *Sander Hake* died about seven years ago, and I and my four children by the said *Sander Hake* (videlicet) *Louisa*, aged about thirteen years, *Elizabeth*, aged about twelve years, *Matilda*, aged

(a) Decided H. T. 1842 (Jan. 24).

The examinations upon which an order of removal was made, contained (inter alia) the following statement.

"I was overseer of &c., the appellant parish, during the time *J. H.* the father of the pauper's husband, occupied the estate, and I collected the poor-rates of him as the occupier."

The following (inter alia) were the grounds of appeal, "that *J. H.* was not rated, and did not pay rates for the estate; that the examination is informal, and wholly insufficient in law, and bad on the face of it; that the examination does

not contain any sufficient evidence of a settlement gained in our said parish by *J. H.*; that the examination does not state in what years *J. H.* occupied &c., or paid rates &c., or that he resided forty days &c."

Held, that the above grounds did not entitle the appellants, at the trial of the appeal, to object that the rate book had not been produced before the removing justices, and that the examination contained no legal evidence that *J. H.* had been rated, because the general objection to the insufficiency of the examination, conveyed no information in itself to the respondents of the ground of appeal intended to be relied on, and was besides preceded by a denial of the fact of rating only, and followed by other specific objections which were equally remote from the point of evidence.

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about nine years, and *Izott*, aged about seven years, are now chargeable to the said parish of Stapleford Fitzpaine."

The examination of *Mary Hake*, who saith as follows: "I am the widow of *John Hake*, deceased. About twenty-six years ago, (being about the year 1815), Mr *George Score* employed my husband to work on and take care of his estate at Blindmore, in the said parish of Buckland St. Mary, and during that year the said Mr. *Score*, who was at our house, said to my husband; "John, you shall have this estate," to which my husband replied, "I am not strong enough to stock it." He then said, "Won't you have it if I give it you? You can borrow some money, and I will be bound for it." It was then understood that my husband was to have it. It contained about 100 acres, and was worth upwards of 100*l.* a year. My husband afterwards stocked the estate, and occupied it about thirteen years, except small parts of it he let to his sons. I believe he paid the rates and taxes all the time for the whole. I frequently saw him pay the overseers the poor rates, and many times paid them myself. After occupying the estate about thirteen years my husband was turned out of it by an ejectment."

The examination of *John Hake*, who saith as follows: "I was present in the year 1815, and heard Mr. *Score* say he would give the estate to my father, and he might do what he liked with it. Mr. *Score* called *John Pinney*, who is now dead, to witness that he gave it to my father. My father afterwards occupied it about thirteen years, except small parts of it, which he about three years afterwards let to me and to my brother under 20*l.* a year, but my father paid the rates and taxes for the whole. From 1815 my brother *Sander* lived on the estate with my father, as one of his family. My father stocked the farm, and paid the rates and taxes. He also bought a new waggon on which his name was painted, and his name was also on the iron work on the gates. I paid my father rent for the land I took

of him. My father during the time he occupied the estate built a new lime kiln on it, and sold lime, and afterwards let the kiln to Mr. *Edward Ackland*."

The examination of *Thomas Willie*, who saith as follows: "I was overseer of the parish of Buckland St. Mary five or six years, during the time the said *John Hake* occupied the estate, and about the year 1826 collected the poor rates of him as the occupier."

The following were the grounds of appeal. "That the said *John Hake*, the father of *Sander Hake*, did not gain any settlement in our parish of Buckland St. Mary by any of the means stated in the examination, and that the said *Betty Hake* and her children were not settled in our parish in the manner stated in the examination. That the said *John Hake* was not rated, and did not pay rates and taxes for the estate at Blindmore, as stated in the examination. That the said *John Hake* never was the occupier of the said estate at Blindmore. That the said examination is informal and wholly insufficient in law, and bad on the face of it. That the examination does not contain any sufficient evidence of a settlement gained in our said parish of Buckland St. Mary by the said *John Hake*, nor does it contain any valid grounds of removal of the said *Betty Hake* and her children to our said parish. That the examination does not shew that *Sander Hake* was at any time settled in our parish of Buckland St. Mary, there being no proof or statement on the face of the examination that the said *Sander Hake* was unemancipated at the time of his marriage, so as to derive a settlement from his father *John Hake*. That the examination does not state when or in what year or years the said *John Hake* occupied the said estate at Blindmore, or in what year or years he paid rates and taxes for the same. That the examination does not state that the said *John Hake* resided forty days in our parish of Buckland St. Mary, during the time that he occupied the said estate at Blindmore, or after he had so paid rates and taxes for the same. That the examination

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does not state any residence by the said *John Hake* in our said parish of Buckland St. Mary, sufficient to confer a settlement under the statute of 13 & 14 *Car.* 2, cap. 12.

Upon the trial of the appeal it was proved that *John Hake*, the father of *Sander Hake*, had from the year 1813 to 1815 managed the estate mentioned in the examination for Mr. *George Score* in the appellant parish. That in 1815 Mr. *George Score* made a verbal gift of the estate to *John Hake*, in the manner stated in the examination. That from 1815 to 1826 *John Hake* resided in and occupied the said estate, claiming title thereto by virtue of the said gift, and paying no rent for the same. That in 1824 *John Hake* made a feoffment of the estate, and levied a fine of the same to the use of himself in fee, and was turned out by ejectment in 1826. That from 1815 to 1826 he was charged to and paid all the parochial rates and taxes in respect of the said estate, including the land tax. That *Sander Hake* resided with his father from 1815 to 1825, as one of his family, being unemancipated, and that he was married to the pauper in August, 1825.

The Court were of opinion, that *John Hake* acquired a settlement in the appellant parish, both by such residence under a claim of ownership of the estate, and also by being charged unto and paying parochial rates and public taxes, and that *Sander Hake* followed his father's settlement up to August, 1825. Although the Court were of opinion, that under these circumstances the settlement of *Sander Hake* was in the appellant parish, and that the respondents were entitled to the judgment of the Court on the merits, they quashed the order upon the ground that the examination was on the face of it insufficient to enable the respondents to go into either of those grounds of removal.

If the Court of Queen's Bench should be of opinion that the examination was sufficient, then the order of sessions to be quashed, and the order of removal to be confirmed. If the Court should be of opinion that the examination was insufficient, the order of sessions to be confirmed.

Erle and *Moody* in support of the order of sessions (a). Unless *S. Hake*, the pauper's husband, was unemancipated when his father acquired the settlement, it of course would not be communicated, and the examination does not state distinctly, as it should, that *S. Hake* was unemancipated at the time in question.

2. As to the settlement itself, which it is sought to communicate to *S. Hake* and the pauper, the examination does not state that *S. Hake*, the father, resided forty days on the property.

As to the rating. The examination discloses legal evidence that *S. Hake* paid the rates, but no such evidence that he was rated: the proper evidence of his having been rated would have been the rate book itself. As therefore an essential fact was proved before the removing justices by other than legal evidence, the case is within *Reg. v. Ecclesall Bierlow* (b) and *Reg. v. Lydeard, St. Lawrence* (c). The observation of *Patteson J.* in the latter case applies here, for it seems that the overseer, who might have produced the rate book, was a witness before the justices, and yet the absence of the rate book is not accounted for. *Reg. v. Middleton in Teesdale* (d) shews that a general allegation, that the examination is bad on the face of it, will let the appellants into the above objection. If it be said, according to the distinction drawn by *Coleridge J.* in *Rex v. Lydeard, St. Lawrence* (c), that the present case is not like *Reg. v. Middleton in Teesdale* (d), where no settlement was shewn on the face of the examination, but that the objection is simply that the settlement is not stated with sufficient particularity, then it must be taken that the sessions, within whose province it is to decide finally upon such a question of particularity, have decided that the settlement has not been sufficiently particularised.

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(a) This case was argued before Lord Denman C.J., *Patteson, Coleridge and Wightman Js.*

(b) 11 A. & E. 607; *S. C. ante*, 160.

(c) 11 A. & E. 617; *S. C. ante*, 191.

(d) 10 A. & E. 688; *S. C.* 3 P. & D. 473.

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As to the estate of *John Hake*. He is not stated to have been the owner, and it is therefore to be presumed that he was not. The parol gift would confer no title on him, and he did not occupy for such a period as to afford a presumption of ownership. On this point they cited *Rex v. Chew Magna* (a), *Rex v. Wooburn* (b), *Rex v. Calow* (c), *Rex v. Pensax* (d).

Sir *W. W. Follett* (with whom were *Bere* and *Fitzherbert*) contra. With regard to the objection that the rating of *J. Hake* was not proved by legal evidence, it is to be recollected that the question between contending parishes is not litigated before the removing justices. The question is not litigated until both parties appear on appeal at the sessions. Before the removing justices there is no party to object to the improper reception of evidence; if at *Nisi Prius* illegal evidence were admitted, a new trial would not be granted on that ground, unless the evidence had been objected to. If the evidence of rating had been objected to before the justices, the rate book might have been produced; but there was no party there who could object. [*Patteson J.* The examination is sent in order that the parish removed to may object at that time; at all events, if the objection is then made, and is found to be good, the respondents can then abandon their order. [*Bere*. After an appeal against the order is entered, it would be too late to abandon the order.] The 4 & 5 *Will.* 4, c. 76, requires the removing justices to state the *grounds* of the removal, not the *evidence*, on which it is made. Again, the removing justices have no means of compelling the production of legal evidence. But, in truth, the rating was proved by legal evidence. The overseers of the appellants parish received payment of the rate, and that is good against that parish

(a) 10 B. & C. 747; S. C. 5 M. & R. 723.
 & R. 635. (c) 3 Mau. & S. 22.
 (b) 10 B. & C. 846; S. C. 5 M. (d) 3 B. & Ad. 815.

as an admission. [*Patteson J.* referred to *Rex v. Coppull*(a).]

Even if the objection to the evidence of the rating is well founded, it has not been properly pointed out in the grounds of appeal. The contending parties should be placed upon an equal footing; the examination discloses the whole case of the respondents, and the general objection, in the nature of a general demurrer, to the sufficiency of the examination, gives no hint that a material fact in the case of the respondents has not been made out by proper evidence. If the general objection in this case is not enough, the specific objections which follow can only mislead, for they induce the respondents to suppose that all the objections which it is intended to be relied on have been minutely particularised. [He was then stopped by the rising of the Court, Lord *Denman C. J.* saying the Court would look into the cases, and call upon him again, if it should be thought necessary.]

Cur. adv. vult.

Lord DENMAN C. J. on the following Monday delivered the judgment of the Court.—This was a case of appeal against an order of removal. At the sessions objections were made to the examination, and also to the reception of evidence in support of the order, in consequence of the alleged defects in such examination. The sessions have found that *John Hake*, the pauper's father in law, under whom the settlement was claimed, acquired a settlement in the appellant parish by residence, under a claim of ownership on an estate, and also by being charged to and paying parochial rates, and that the respondents were entitled to the judgment of the court on the merits, but they quashed the order, on the ground that the examination on the face of it was insufficient to enable the respondents to go into either of the grounds of removal. The sessions have submitted to us simply the

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(a) 2 East, 25.

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question of the sufficiency of the examination for these purposes.

On the part of the respondents the case has at present been only argued in respect of the settlement by rating, and, if we are of opinion that the examination was sufficient to let them into their case on this head of it, it will be unnecessary to go farther, as one ground of removal is enough, and the sessions have not submitted to us the conclusions which they have drawn from the evidence, supposing they were at liberty to receive and consider it at all.

Before we inquire into the sufficiency of the examination it is necessary to consider the statement of the grounds of appeal, because the appellants can make no other objections to any part of the respondent's case than are stated in such grounds, and we agree with the respondent's counsel, that at least the same degree of strictness is to be used in deciding upon the sufficiency of such statements as in deciding on that of the examination. Both are to be treated candidly, and with a view to advance the objects of the statute in requiring their mutual delivery. The examination, construed fairly, must shew that the justices have *primâ facie* been justified in making the order; the grounds of appeal, construed in the same way, must disclose the nature of the objections to the order, or the new matter, as the case may be, which induces the appellants to resist the removal. By these modes the legislature has wisely thought that the expence of groundless removals and fruitless appeals may best be prevented, and it is the duty of the court of quarter sessions, and of this Court, to take care that the provisions of the statute be fairly and fully carried out.

The statement of the grounds of appeal, so far as regards the present question, after objecting that in fact "*John Hake was not rated, and did not pay rates as stated in the examination,*" proceeds thus, "that the said examination is *informal and wholly insufficient in law, and bad on the face of it; that it does not contain any sufficient evidence of a*

settlement gained in our parish, nor any valid grounds of removal to our parish; that it does not shew that *S. Hake* was unemancipated at the time of his marriage, so as to derive a settlement from his father; that it does not state in what year or years *John Hake* paid rates and taxes, or that he resided forty days after he had so paid rates and taxes."

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It may be conceded that the examination does not in any part state in express terms, that *John Hake* was rated, and assuming that the parish rates were not produced or proved before the removing justices, two questions might have arisen; the first, whether the examination is on these accounts defective, the second, whether looking at it, and the notice of appeal, the respondents could be properly admitted to prove a rating at the trial. But it appears to us that the statement itself is so framed as to preclude the appellants from insisting upon either of these objections. As to the first, it does not object to the examination any want of proof of rating; it denies that in fact *John Hake* was rated, but does not say that the examination contains no evidence of it. It was urged that this objection was open under the general words "*is informal, and wholly insufficient in law, and bad on the face of it;*" we are quite clear that under these words, if they stood alone, no objection would in this case be open to the appellants, for they would convey no information to the respondents of the ground of appeal intended to be relied on; and to hold them sufficient would defeat the very object of the statute. The addition of other particulars, instead of helping the appellants, makes their case worse. Any one reading these general words, followed by specific objections, would conclude that they were intended to introduce and comprise no more than such particulars as were afterwards so specified. And when, besides this, they are preceded by a denial in terms, that *John Hake* was in fact rated, the respondents would still more certainly be led to conclude that it was not intended to object to want of evidence before the remov-

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certiorari be convicted of the offence for which he was indicted, that then the said Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a *justice of the peace*, mayor, bailiff, constable, headborough, tythingman, churchwarden, or overseer of the poor, or *other civil officer*, who shall prosecute upon the account of any fact committed or done, that concerned him or them as officer or officers to prosecute or present."

The metropolitan police commissioners, having prosecuted the defendants to conviction, are clearly entitled to costs within the above provision. By the Metropolitan Police Act, 10 *Geo.* 4, c.44, s.1, they are made "justices of the peace," and they are clearly also "civil officers" who have prosecuted an offence against a constable of their own force, which it "concerned them as officers to prosecute." The police commissioners were especially bound to support in the discharge of his duty the constable, who was one of those whom section 5 of the 10 *Geo.* 4 subjects to the control of the commissioners, and to such "orders and regulations as the said justices shall from time to time deem expedient, for preventing neglect or abuse, and for rendering such force efficient in the discharge of all its duties."

This case therefore is distinguishable from cases which will be relied upon in support of this rule. In *Rex v. Sharpness* (a) the costs in question were not allowed to a magistrate who had prosecuted a gaoler for suffering a prisoner to escape, because the offence did not concern the magistrate more than any other person. Again, it was held in *Rex v. Dewhurst* (b) that a select vestry, prosecuting for a libel on the governor of the parish workhouse, were not entitled to costs; but there the party grieved was only a nominal prosecutor. In *Rex v. Edwards* (c), the paving and lighting commissioners of Derby, who prosecuted for

(a) 2 T. R. 47.

(c) 5 B. & Ad. 407, n.

(b) 5 B. & Ad. 406; S. C. 2 N. & M. 253.

an assault upon a watchman within the borough, were held not to be public officers within the statute, but there it did not appear that the party assaulted was under their control, so that it did not concern them especially to prosecute. (Mr. Robinson of the Crown Office produced the affidavits in the last case cited, which shewed that the watchman assaulted was appointed by the paving and lighting commissioners.) *Rex v. Sharpness* (a) seems to be overruled by *Rex v. Kettleworth* (b), in which last case the observations of Lord Kenyon C. J. are quite irreconcilable with those of Buller J. in the former case, and it was held that a magistrate who had indicted a party for not repairing a road, was entitled to costs under the statute. So in *Rex v. Taunton St. Mary*, (c) which was also an indictment for non-repair of a road, the constable of the manor, within which the road lay, was held to be an officer, "whom it concerned to prosecute." Both those cases seem to go farther than the present.

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Martin contra, relied upon the authorities which the other side had sought to distinguish, and contended that the connection between the commissioners and the constable in the present case did not appear (d), and the circumstance of their being justices was not of itself sufficient to bring them within the statute.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term (Nov. 25), delivered the judgment of the Court.—This was a rule to set aside a side bar rule previously issued for giving the costs of this prosecution to the commissioners of police, by whom it was set on foot, for an assault committed on a police constable in the execution of his duty, under the 5 & 6 W. & M. c. 11, s. 3, which provides in ex-

(a) 2 T. R. 47.

(b) 5 T. R. 33.

(c) 3 Mau. & S. 465.

(d) The Court referred to the

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indictment, after objection that the facts of the case were to be gathered from the affidavit alone.

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press terms that, "if the defendant prosecuting such writ of certiorari be convicted of the offence for which he was indicted, then the Court of King's Bench shall give reasonable costs to the prosecutor, if he be the party grieved or injured, or be a justice of the peace, or any other civil officer, who shall prosecute upon the account of any fact committed or done that concerned him or them as officer or officers to prosecute or present."

Now the commissioners of police were called into existence by the following words of 10 Geo. 4, c. 44, s. 1, "It shall be lawful for his majesty to cause a new police office to be established by warrant, and under his sign manual to appoint two fit persons as justices of peace to execute the duties of a justice of peace, and such other duties as are thereafter specified, or shall be from time to time directed by one of the secretaries of state, for the more efficient administration of the police." On these words it is difficult to feel any doubt that the commissioners will be entitled to their costs of an indictment which they preferred for an assault on one of their subordinate officers in the execution of his duty, which has been removed by the defendant (as this was) by certiorari, and on which (as here) a conviction has taken place. We think that they fully answer the description of civil officers so concerned, even if they were not justices of the peace, and as such named in the act of *W. & M.*

We should at once have delivered this opinion but for a case reported in a note to 5 *B. & Ad.* 407, which, being apparently inconsistent with our views, we wished to examine. The short note of the judgment of the Court in that case is not very accurately expressed; it certainly appears, however, on reference to the affidavits, that the two cases are alike as to the relation between the paying commissioners and the watchman assaulted, and the part which the former took in the prosecution. But, although in point, we do not agree with the decision, and if the commissioners there had put forward their claim directly and in the first

instance, instead of preferring that of the nominal, who was clearly not the real, prosecutor, it is possible that the Court might have been led to a different conclusion. On the plain words of the two acts, and the facts appearing on the affidavit and the indictment, we are of opinion that the commissioners of police are entitled to their costs, and the present rule must be discharged.

D.

Rule discharged.

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The QUEEN v. SPACKMAN and others.

THIS was a rule to shew cause why an order of the Wiltshire Quarter Sessions, made in October, 1839, upon appeal against the account of the defendants, as late churchwarden and overseers of the parish of Bradford in that county, allowed by three justices on the 31st July then last, should not be quashed, on the ground that the account did not appear to be the *annual* account, and that the quarter sessions had no jurisdiction to make an order as to any other than the annual account.

The following was the material part of the order:—"On hearing the appeal of *Thomas Savage*, an inhabitant of the parish of Bradford, &c. against the account of *Charles Spackman*, late one of the churchwardens, and of &c. three of the late overseers &c., allowed by *A. B. and C. Esqrs.* three of his Majesty's justices of the peace in and for the said county, on the 31st day of July last, and on hearing witnesses for the appellant &c., this Court doth order that the following charges &c. be disallowed."

Wednesday,
Nov. 7th.
Saturday,
Nov. 13th.
An order of quarter sessions, on appeal against an account of overseers, is bad, if it does not appear, either by express averment or necessary intendment, to relate to the *annual* account, for otherwise it may relate to the quarterly account, which the overseers are directed to render by 4 & 5 Will. 4, c. 76, s. 47, and in respect of which there is no appeal to the quarter sessions.

Sir *F. Pollock A. G., Kelly*, and *Archbold* shewed cause. The objection to the order is, that it does not appear to relate to the *annual* accounts of the churchwardens and overseers, over which alone the quarter sessions have jurisdiction. By the 43 Eliz. c. 2, s. 2, the churchwardens and overseers "shall, within four days after the end of the year," deliver

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their accounts to two justices. By 17 *Geo. 2*, c. 38, s. 1, they are, "yearly and every year," to deliver their accounts to the succeeding overseers within fourteen days of their appointment; and by sect. 4, persons aggrieved by the account may appeal to the quarter sessions. By 50 *Geo. 3*, c. 49, s. 1, reciting these enactments, and that it is expedient that two or more justices should have power to "examine and correct and to *allow* and approve" the accounts; such power is conferred accordingly upon two or more justices at special sessions within the fourteen days appointed by 17 *Geo. 2*, for delivering such account. Before the 4 & 5 *Will. 4*, c. 76, s. 47 (a), therefore, it would have been clear

(a) The 47th section enacts,—
 "That every overseer, treasurer, or other person having the collection, receipt, or distribution of the monies assessed for the relief of the poor in any parish or union, or holding or accountable for any balance or sum of money, or any books, deeds, papers, goods, or chattels relating to the relief of the poor, or the collection or distribution of the poor rate of any parish or union shall once in every quarter, in addition to the annual account now by law required, and where the rules, orders, and regulations of the said commissioners shall have come in force, then as often as the said rules, orders, and regulations shall direct, but not less than once in every quarter, make and render to the guardians, auditors, or such other persons as by virtue of any statute or custom, or of the said rules, orders, or regulations, may be appointed to examine, audit, allow, or disallow such accounts, or in default of any such guardian, auditor, or other person being so appointed as afore-

said, then to the justices of the peace at their petty sessions for the division in which such parish or union shall be situate, a full and distinct account in writing of all monies, matters, and things committed to their charge, or received, held, or expended by them on behalf of any such parish or union, and if thereunto required by the justices, guardians, auditors, or other persons authorised in that behalf, shall verify on oath the truth of all such accounts and statements from time to time respectively, or subscribe a declaration to the truth thereof, in manner and under the penalties in this act provided for parties giving false evidence or refusing to give evidence under the provisions of this act; and all balances due from any guardian, treasurer, overseer, or assistant overseer, or other person having the control and distribution of the poor rate, or accountable for such balances, may be recovered in the same manner as any penalties and forfeitures are recoverable under this act; pro-

that the accounts now in question could have been no other than the annual accounts, and that the quarter sessions in the present case must have had jurisdiction. But it is said that, as by the last-mentioned enactment "there are now in addition to the annual accounts, certain other *quarterly* accounts also required of the overseers to be rendered to the guardians, auditors, or such other persons as may be appointed by the Poor Law Commissioners to "examine, audit, *allow or disallow* such accounts," or, "in default of such guardian, auditor, or other person being so appointed as aforesaid, then to the justices of the peace at their petty sessions," therefore, the quarter sessions may, and in this case have, made an order with respect to such *quarterly* accounts, over which they have no jurisdiction. The answer is, that every reasonable intendment is to be made in favour of an order of justices: *Rex v. Clayton* (a), *Rex v. Cleg* (b), *Rex v. Higher Walton* (c), and *Rex v. Mayfield* (d), and it must therefore be taken that this order relates to the annual accounts, over which the quarter sessions had jurisdiction, and not to the quarterly accounts, over which they had not jurisdiction. Again, to vitiate this order, the Court will have to make intendments *against* it, for these could not have been quarterly accounts within 4 & 5 Will. 4, c. 76, s. 47, unless the Court intends that there was no "guardian, auditor, or other person appointed by the commissioners," and that, in default, the accounts came before the petty sessions. The order recites that the accounts had been "*allowed*" by three justices. This shews that they were not the quarterly accounts, for, although the section gives power to the "auditor, guardian, or other person" to "allow," it gives no such power to the petty sessions, who are authorised merely to receive the account.

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vided nevertheless, that no such proceeding shall exonerate or discharge the liability of the surety of any such treasurer, overseer, assistant overseer, or other person

as aforesaid,"

(a) 3 East, 58.

(b) 1 Str. 475.

(c) 1 Burr. S. C. 162.

(d) 1 Burr. S. C. 453.

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Hodges contra. The Court will never intend jurisdiction; and no presumption from the manner of describing a fact can supply the omission of a direct averment of its being within the requisite jurisdiction: *Rex v. Edwards* (a). In *Rex v. Bartlett* (b) an order of sessions relating to accounts of overseers was moved to be quashed because it did not appear they had previously been allowed by two justices, and they had come per saltum to the sessions. It was argued that they did appear to have been allowed, "for the appeal is said to be against the disbursements and the allowance thereof, which the Court will presume was regular." "Sed per Curiam. It does not follow that this was an allowance by two justices, for the parish might do it, and therefore, for want of jurisdiction, this order must be quashed." On the subject of intendment he referred also to *Rex v. Sheppard* (c), *Reg. v. Toke* (d), *Reg. v. Read* (e). [Coleridge J. It must be taken I think that the justices at petty sessions are to have the same power, under 4 & 5 Will. 4, c. 76, s. 47, as the auditor or other person, in default of whose appointment, the quarterly account comes before such justices, of examining and auditing the account, otherwise the consequence will be that, where the account is rendered to the auditor &c., the balance due from the overseers will be paid over quarterly, and that, where the account is rendered to the justices, the balance will stand over till the end of the year.]

Lord DENMAN C. J.—This order cannot be supported, unless it appear that the justices who made it had jurisdiction, and it is admitted that there was no jurisdiction unless the account appears to have been an annual account. Now it does not appear from the order what sort of account it was. There is another account to be rendered by overseers

(a) 1 East, 278.

(b) 2 Str. 983.

(c) 3 B. & Ald. 414.

(d) 8 A. & E. 227; S. C. 3 N. & P. 323.

(e) 9 A. & E. 619; S. C. 1 P. & D. 413.

besides their annual account. It may be therefore that jurisdiction has been improperly exercised by the quarter sessions over an account which was not the annual account. This may have been the case consistently with this order, and it is not enough that the order could not have legally been made, unless it related to the annual account.

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WILLIAMS J.—The argument in support of the order was not put higher than this—that it stood indifferent, upon the face of the order, whether it related to the annual or to the quarterly account, and that therefore, if we decided the order to be bad, it would only be by making intendments against it. But it is now settled law that it must not stand indifferent upon the face of an order of justices, whether they had jurisdiction or not—it must appear that they had. Here in one case they had jurisdiction, and in the other had not: either case is consistent with the order, it therefore does not shew jurisdiction.

COLERIDGE J.—I am of the same opinion. The jurisdiction of the quarter sessions is confined to the annual account. Does this order of the quarter sessions refer to the annual account? It is said to be in the usual form and it is said that down to the passing of the 4 *Will.* 4, c. 76, s. 47 no account of overseers, except the annual account, came before justices, and that there is nothing in that act to alter the usual form. That may be so, but forms grow out of the law, and, when the law is altered, forms must adapt themselves to the altered law. By the 4 *Will.* 4 there is another account to be rendered by overseers, over which the quarter sessions have no jurisdiction. We cannot tell to which of the two kinds of account this order relates. It is said that the recital in the order that the account had previously been allowed by justices shews that it could not be the new quarterly account, as the 47th section does not authorise the justices, before whom, in default of an auditor, the account is brought, to allow it, or to do any

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thing more than simply receive it. I do not agree in this construction of the section; I think the justices at petty sessions must have the same power with the auditor or other person for whom they are substituted, to "examine, audit, allow or disallow" the account. This view is confirmed by what is directed as to paying over the balance of the account. The balance must mean the just balance which is found due after examination of the account.

WIGHTMAN J.—It is admitted that the quarter sessions had no jurisdiction unless this was the annual account of the overseers. The order contains no averment that it was the annual account, and though before the 4 & 5 *Will.* 4, c. 76, s. 47, it could have been no other account, yet now it may have been either the annual or the quarterly account. It is said that this order on the face of it relates to an account which had previously been "allowed" by justices, and that therefore it must have been the annual account, because the justices under the Poor Law Amendment Act have no jurisdiction to "allow" the account, although they are called on in default of the auditor or other person who is expressly authorised to allow it. If this construction is right, it would seem to follow that, where there is no auditor or other person appointed, the balance from the overseers cannot be called for until the end of the year, although, if there is such auditor or other person appointed, the balance may be called for directly. I think, therefore, the construction contended for is erroneous, and that this order is bad, as it does not appear, either by express averment or necessary intendment, to relate to the annual account, over which alone the quarter sessions can have jurisdiction.

D.

Rule absolute to quash the order.



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LEICESTER (a).

ON an appeal against the removal of *John Inge*, from the parish of St. Margaret, Leicester, the sessions quashed the order, subject to the opinion of this Court on the following case:—

John Norton, of Leicester, being seised of fourteen freehold houses, situate in the parish of St. Margaret, in the borough of Leicester, by his will, bearing date on or about the 24th of October, 1832, and duly executed and attested to pass real estates, after directing the payment of his debts and funeral and testamentary expenses, and certain pecuniary legacies, which he thereafter bequeathed, out of his personal estate, gave, subject thereto, all his personal estate, and also gave, devised, and bequeathed all his lands, messuages, tenements, hereditaments, and real estate whatsoever and wheresoever, unto *Richard Rawson* and *Thomas Cooper*, their heirs, executors, administrators, and assigns for ever, upon trust that the said trustees, or the survivor of them, did and should, as soon as conveniently might be after his decease, sell and dispose thereof, either by public auction or by private contract, for the best price that could be obtained for the same, and did and should stand possessed of the monies arising from such sale, after payment of the costs and expenses attendant thereon, upon trust to pay and divide the same equally between and amongst the testator's nine children, being five daughters and four sons, respectively enumerated in the said will. And as to the shares of such of the testator's said daughters as should be married at the time of his decease, the testator gave and bequeathed the same to and for their own sole, separate, and absolute use and benefit and advantage; and he directed that their respective receipts alone should be sufficient discharges for the same. The trustees were authorised to reimburse

Testator devised his real estate to trustees, to sell and divide the proceeds among his nine children, the share of such of his daughters as should be married at his decease to be to their separate use.

The pauper, before testator's death, married one of the daughters, and resided with her in a house, part of the above estate, paying rent weekly to the testator. He resided also two years after testator's death, and before the real estate was sold, paying the rent to the trustees.

Held, that he gained no settlement.

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themselves, out of the trust monies, the expenses of executing the trusts of the said will; and their conveyances of the devised premises to the purchasers, and their receipts for the purchase-money, were declared to be effectual and sufficient. The said *John Norton* died on or about the 23d of November, 1832. The real estate consisted of the freehold houses above mentioned. *John Inge*, the pauper, was married to *Ann Norton*, one of the testator's nine children, mentioned in his said will, in the year 1823. Some time prior and up to the testator's death, the pauper, with his wife and family, occupied one of the said houses, in the said parish of St. Margaret, as his tenant, at the rent, first of 2s., and afterwards at 1s. 10d. per week. After the testator's death, the pauper continued to occupy the same house, and paid the same weekly rent of 1s. 10d., as tenant to the said trustees, to a collector employed by them to collect the rents for all the said fourteen houses. The trustees every month divided the whole sum so collected equally amongst the said nine children of the testator, and the share received by the pauper, on such division, was generally 8s. or 10s. per week. The pauper resided more than forty days after the death of the testator in the said house, so occupied by him as tenant as aforesaid, in the parish of St. Margaret aforesaid. The pauper continued to reside, and the trustees to receive and divide the rents in the manner above mentioned, for nearly two years after the death of the said testator. The testator's real estates were sold by the trustees in the year 1834, and the proceeds of the sale, after payment of the expenses attendant thereon, were equally divided amongst the testator's said nine children. The pauper received his wife's share, amounting to 54*l.* 19s.

The question for the opinion of the Court was, whether, under these circumstances, *John Inge* obtained a settlement in St. Margaret's, Leicester.

G. T. White and *N. Goldsmid* in support of the order of sessions. The pauper gained a settlement by residing

forty days, after the death of the testator, upon an estate vested in trustees for the separate use of his wife: *Rex v. Offchurch* (a). The pauper's wife had an equitable interest notwithstanding the trust to sell: *Rex v. Wivelingham* (b). In *Rex v. Natland* (c), which is precisely in point, it was argued, that "as the pauper and his wife inhabited in Natfield in part of the house devised from her mother's death in June 1769, till the same was conveyed in February following, and she was entitled to a distributive share of the money to be raised by sale of the demised premises, the pauper was not removable during that time, and consequently gained a settlement in Natland, and the argument was supported by Gould J., to whom the case was referred on circuit, and by Lord Mansfield C. J. subsequently, when it was sought to have the case reconsidered. The testator's daughters in this case had a clear equitable interest, and on electing to keep this estate might at any time in a court of equity have compelled a conveyance to trustees to their separate use: *Pearson v. Lane* (d), cited in *Lewin on Trusts*, p. 496. *Rex v. Aslacby* (e) goes much beyond the present case. There a mortgagor in possession gave by will all his real and personal property to trustees in trust to sell and apply the proceeds to pay his mortgage debts, &c. and the residue to his wife for her own use. After his death, the wife resided in the parish where the land was, but not on the land, and the trustees resided on the land, and did not sell or render an account; and it was held that the wife gained a settlement by such residence, although it appeared that the trustees would have willingly sold the land for the principal and interest due on the mortgage, and although evidence was offered that the real and personal estate was not solvent. The respondents will probably take the distinction to be found in 2 Nol. P. L. 100: "In some recent decisions the Court

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(a) 3 T. R. 114.

(d) 17 Ves. 101.

(b) 2 Doug. 767.

(e) 5 A. & E. 201; S. C. 6 N.

(c) 3 Burr. S. C. 796

& M. 582.

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appears to have taken a distinction between an equitable estate properly so called, and a mere equitable right to have a conveyance of the legal estate. If there be any doubt as to what a court of equity would do, a court of law cannot take cognizance of the estate, even so far as the question is connected with the party's settlement." But here there can be no doubt what a court of equity would do, and the case therefore is distinguishable from *Rex v. Berkswell* (a), *Rex v. Woolpit* (b), *Rex v. Geddington* (c), and *Rex v. Llantillio Grosseny* (d), in which cases the party whose equitable right was set up had no locus standi whatever in a court of equity. [Coleridge J. Surely a court of equity would do nothing here without the consent of all the children.]

Mellor and *K. Macaulay* contra. The conversion directed by testator is a conversion out and out, and the trusts of the will could not be satisfied without a sale and a division. The question depends on the point just suggested—whether *all* the children would come into equity and elect to have a conveyance. No one of the children singly could by filing a bill alter the character of the property devised. On this point, *Fletcher v. Ashburner* (e), cited in 1 *Williams on Executors*, 513 (f), may be referred to. It appears also from 1 *Roper on Legacies*, 474 (g), and the cases there cited, that the case of a married woman is an exception to the general doctrine of election, and "that, without the interposition of a court of equity, coverture is a disability to a woman's electing to change the nature of her property." [Coleridge J. The residence by the pauper as tenant seems to shew that, in point of fact, there had been no election]. In *Rex v. Wivelingham* (h), which has been relied upon, the cestui que trusts had agreed that the trustees should not sell: on the other hand, in *Rex v. Wid-*

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| (a) 1 B. & C. 542; S. C. 3 D. | & R. 320. |
| & R. 9. | (e) 1 Bro. C. C. 497. |
| (b) 4 D. & R. 456. | (f) 3rd edit. |
| (c) 3 D. & R. 403. | (g) 3rd edit. |
| (d) 5 B. & C. 461; S. C. 8 D. | (h) 2 Doug. 767. |

worthy (a) there was no agreement between the pauper and the other next of kin, and it was held that no settlement was gained. The pauper here could not have chosen any particular cottage to reside in. The cases where there is a sole next of kin, and where there are several in equal degree having an equal right are very different: *Rex v. Cold Ashton* (b), *Rex v. Horsley* (c). *Rex v. Natland* (d) is distinguishable, for the pauper for a certain interval paid no rent, and Lord Mansfield C. J. cannot be said to have assented to the decision, for he refused to go into the case, because Gould J., who had decided it, was to be considered as an arbitrator to whom both parties had referred it. They also relied on *Rex v. Berkswell* (e) and *Rex v. Ged-dington* (f).

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LORD DENMAN C. J.—*Rex v. Natland* (d) is not a very good ground to rest the settlement in this case upon. Gould J. decided that case as an arbitrator, and the facts on which he decided do not seem to be very clearly ascertained.

PATTESON J.—It is doubtful whether the statement of facts is correct in *Rex v. Natland* (d). In most of these cases where the settlement has been allowed, there has either been only one person entitled, or there has been an agreement between the several persons entitled. It appears too here that the pauper resided on the property as tenant.

COLERIDGE J.—This case may be decided on two grounds. First, the pauper appears to have resided as tenant. Secondly, it is at all times a delicate matter for us to take cognisance of equitable rights, but we have one

(a) 1 Burr. S. C. 109.

(b) 2 Burr. S. C. 444.

(c) 8 East, 405.

(d) 3 Burr. S. C. 793. The Court read the abstract of the case in Burn's Justice (ed. by D. & W.), where the statement as to non-

payment of rent, for a certain interval, is not so clear as in the report cited above.

(e) 1 B. & C. 542; S. C. 3 D. & R. 9.

(f) 2 B. & C. 129; S. C. 3 D. & R. 403.

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broad rule that we will notice nothing but a clear right, and will not go into doubtful cases of equity. Here there were nine persons interested in the devised property, and nothing has been done by agreement between them to turn it into real estate. I would rather not put our decision upon *Rex Geddington (a)*, which is of doubtful authority, and it is not necessary to do so.

WIGHTMAN J.—I think there was not such an equitable right here as to bring the case within the rule laid down in *Rex v. Toddington (b)* and *Rex v. Berkswell (c)*. There were nine persons interested, and the concurrence of all would have been necessary to induce a court of equity to convert the devised property: the power of sale would be much prejudiced if the whole could not be sold.

D.

Order of Sessions quashed.

- (a) 2 B. & C. 129; S. C. 3 D. (c) 1 B. & C. 542; S. C. 3 D.
 & R. 403. & R. 9.
 (b) 1 B. & Ald. 560.

The QUEEN v. The Justices of the WEST RIDING (d).
 (LONGWOOD v. HALIFAX.)

1. Where parish officers have obtained an order of removal on an insufficient examination, they may procure a superseas of the order, although it has been executed by the actual removal of the pauper, and notice of appeal has been given.

PASHLEY obtained a rule to shew cause why a mandamus should not issue, commanding the justices of the West Riding to enter, as of the last Midsummer general quarter sessions of the peace, held in and for the said

(d) Decided H. T. 1842 (Jan. 28).

2. After such superseas has been served, and all costs have been paid, and the pauper taken back, the parish on which the order was made has no right of appeal.

3. Where an appeal had been entered against an order, after it had been so superseded, and the sessions decided that they had jurisdiction to entertain the appeal notwithstanding, but afterwards ordered it to be struck out, on the ground that the original order of removal had not been filed with the notice of appeal, as required by a rule of their practice relative to the entry of appeals, a rule for a mandamus to them to hear the appeal was discharged, because the result at which they had ultimately arrived was right, and this Court would not inquire into their reasons.

Riding, an appeal against an order for the removal of *Joseph Fox* and others, from the township of Halifax to the township of Longwood, and to enter continuances &c., and to hear and determine the said appeal.

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It appeared from the affidavits, that the order had been made on the 8th of May, 1841, served on the 11th of May, and executed by the actual removal of the paupers to Longwood, soon after the expiration of twenty-one days from the date of the service. After the twenty-one days, and after the actual removal, viz. the 15th of June, notice of appeal was given by the parish officers of Longwood for the then next quarter sessions. One of the grounds of appeal stated was, that the order was bad, because it had been made on hearsay evidence. On the 21st of June, the respondents, conceiving the above ground of appeal to be valid, obtained from the removing justices a supersedeas of their order, and on the following day served the township of Longwood with the supersedeas, and stated at the same time that the paupers would be taken back, and the expenses consequent upon their removal would be allowed to Longwood in the account current between the townships. To this course no objection was made. The paupers were taken back to Halifax on the 16th July, and the expenses claimed for maintenance &c., by the officers of Longwood, were settled in September. On the 31st July another order of removal was obtained upon a different examination, and against this second order an appeal had been entered and respited at the October sessions.

The affidavits in support of the rule stated also, that on the 30th June last an appeal was entered at the quarter sessions against the first order, which had been superseded. That the appellants moved that this order should be quashed for the insufficiency of the examination, and that the respondents opposed the application on the ground that the order, having been so superseded, was as if it had never existed, and they contended that the sessions had no jurisdiction to permit an appeal to be entered against it, and

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that the entry of the appeal ought to be struck out of the records of the sessions. That the sessions decided that they had jurisdiction to permit the appeal to be entered, and proceeded to dispose of it. That it was conceded throughout the discussion that the order in question was bad on account of the insufficiency of the examination; that the sessions decided that the order should be discharged, and did discharge it "generally," notwithstanding an application by the respondents that it should be discharged specially "for want of form." That, on the same day, after the sessions had returned to other business, and a considerable time after the order had been so disposed of, the respondents suggested to the Court that the originals of the order of removal, and of the examination on which the same had been made, ought to have been filed according to a rule of the sessions, which provides that "all appeals shall be entered, and the respective orders or convictions appealed against shall be filed with the clerk of the peace, before the sitting of the Court on the first day of every sessions," &c. That the Court on such last mentioned point decided that, since the original order had not been filed according to the said rule of practice, the sessions had no jurisdiction to hear the appeal, and they accordingly directed the clerk of the peace to strike out such appeal and to take the copy order, the notice of chargeability and the copy examination from the file of the Court, which was done. That the appellants had never received the original order from the respondents.

The affidavits in opposition to the rule stated, that in the earlier part of the day the case stood over for convenience of counsel; that no decision whatever was then come to, and that the only decision in the case was the ultimate decision that the entry of the appeal should be erased as if it had never been made. That the appellants did not claim to have the appeal entered, on the ground of requiring security of costs. That the appellants had never given

notice to produce or required possession of the original order.

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Baines now shewed cause. The respondent parish finding that their order of removal rested upon hearsay evidence, and that it could not, therefore, be sustained, have adopted the very course pointed out by *Patteson J.* in *Reg. v. Ecclesall Bierlow* (a) and *Reg. v. Lydeard St. Lawrence* (b); they have abandoned that order and made another upon better evidence, and it would be a great hardship if they should not be allowed to do so as soon as they discover their error. It was certainly competent to the respondents to abandon their own order even after its execution. In *Rex v. Justices of Norfolk* (c) it was held, that where an order of removal has been executed, and by consent of the removing parish and the magistrates making it is superseded, and the paupers taken back, it is in the discretion of the sessions to enter an appeal against it or not, according as they may think that justice requires it, in order to compel the respondents to pay the costs of maintenance incurred by the appellants before the order was superseded. *Bayley J.* said in that case, "This is a very different case from *Pancras v. Rumbold* (d), which is only an authority to shew that the justices having been surprised into making an order, may, of their own authority, and without the consent of the removing parish, supersede it before execution, but not after." But in this case there is the consent of the removing parish. The language of Lord *Ellenborough* in *Rex v. Didlebury* (e) puts it upon the very ground, for he says, "There are two ways of getting rid of an order; one by consent of the parish in whose favour it is made to abandon it, the other by appeal;" and he adds afterwards, "What objection can there be, as Lord *Mansfield* observed in the case of

(a) 11 A. & E. 607; S. C. ante, 160.

(b) 11 A. & E. 616; S. C. ante, 191.

(c) 5 B. & Ald. 484; S. C. 1 D. & R. 69.

(d) 1 Str. 6.

(e) 12 East, 359.

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Rex v. Llanrhydd (a), to a party's abandoning a judgment intended for his own benefit? These observations shew that the consent of the removing parish alone is requisite. I think that in cases like this the sessions may exercise a discretion, and enter the appeal or not, so as best to answer the purposes of justice. If the parties removing do not chuse to pay the expenses of maintenance incurred previously to the supersedeas, they may then enter the appeal, for the purpose of compelling them so to do. If they are willing to do it, the sessions may refuse to enter the appeal." The present case stands on a better ground than the case cited, for here the costs of maintenance consequent upon the execution of the order were settled before the appeal was entered, whereas there it does not appear that they were. In *Reg. v. Justices of Middlesex* (b), where it was held that the appellants had a right to insist on their appeal being heard, after the order of removal had been superseded, the appeal had been entered and a day fixed by the sessions for hearing it, so that the sessions had possession of it. The sessions did right in dismissing this case. Even if their reasons were wrong, the matter was within their jurisdiction, and this Court will not interfere. It is immaterial what may have been the course adopted previously at the sessions, they ultimately refused to entertain the appeal. [He was then stopped. Lord Denman C. J. Can we review the decision of the sessions?]

Pashley contra. It is laid down in *Pancras v. Rambold* (c) that the justices cannot supersede their order after execution. This order had not been executed, and the case differs from *Rex v. Justices of Norfolk* (d), where the sessions never had entertained the appeal, and from *Rex v. Diddlebury* (e) where both parishes consented to supersede

(a) 2 Burr. S. C. 658.

(b) 11 A. & E. 809; S. C. 3 P. & D. 459.

(c) 1 Str. 6.

(d) 5 B. & Ald. 484; S. C. 1 D.

& R. 69.

(e) 12 East, 359.

the order. Here the sessions *did* exercise their jurisdiction to hear the appeal, and their original decision was right. *Patteson J.* appears very recently to have doubted whether an order of removal could be abandoned after execution. After the pauper's removal the justices who made the order were *functi officio*: they had given judgment, and their judgment had been executed. It was too late therefore to supersede it. "Supersedeas is a writ that lies in divers cases, as appears by *Fitzherbert's N. B. f. 236 A.*, but it is always a command to *stay* some ordinary proceeding, which otherwise ought to *proceed*:" *Termes de la Ley* (Supersedeas). "Upon writ of error brought of a judgment given in London, or other court, the party shall have a supersedeas &c., directed to *surcease* from execution:" *Fitzherbert, N. B. 239.*

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The ground on which the sessions refused ultimately to hear the appeal was illegal. The sessions cannot make any rule of practice which in effect will introduce a new condition of appeal, without the propriety of their conduct being liable to question in this Court. It is said the sessions have decided, and that their decision cannot be reviewed. But this Court has repeatedly held, that it is not precluded from inquiring whether the sessions have decided rightly upon any preliminary point of practice necessary to determine their own jurisdiction: *Rex v. Justices of West Riding, (a) Rex v. Justices of Staffordshire, (b) Rex v. Justices of West Riding (c).*

LORD DENMAN C. J.—In this case the appellants stated as a ground of appeal against an order of removal, that it was made upon insufficient evidence; and the respondents being convinced that the objection was good, had their order superseded, and agreed to pay all expenses which the removal had occasioned to the appellants. This took

(a) 10 A. & E. 685; S. C. 3 P. & M. 477.
& D. 462 (c) 5 B. & Ad. 667; S. C. 2 N.
(b) 4 A. & E. 842; S. C. 6 N. & M. 390.

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place before the appeal was entered. The appellants however entered their appeal, and went to sessions. The first question is, whether the sessions could entertain this appeal against an order of removal, which had been thus abandoned after execution. The sessions appear to have thought at first that they could try the appeal, but in the course of the day they struck it out, on learning that one of their rules of practice to be observed on entering appeals had not been complied with. The object of this application is to make them restore the appeal and hear it, so as to get a decision, which may conclude the respondents on their first insufficient order, and shut them out from contesting an appeal against their second and amended order upon the merits. The object is certainly one which we do not view with favour, but still, if the law requires it, we must grant the application. Have then the sessions acted so with respect to the appeal before them that we are called upon to interfere? It is said that we must control them, as they have improperly decided to strike out an appeal because one of their rules of practice had not been observed. But we have nothing to do with the reasons on which the sessions have decided. If they had struck out the appeal in the first instance, they would have acted correctly, for the appeal was against an order of removal which had been superseded. Eventually they did strike out the appeal: they were right in doing so, and we will not inquire into their reasons.

But it is said that the result itself, which the sessions have come to, (without reference to their reasons,) is wrong, because an order of removal cannot be superseded after it has once been carried into execution. The words of the old decision, which is relied upon for this point, appear to me much too large, and the case has been reviewed in *Rex v. Diddlebury (a)* and *Rex v. Justices of Norfolk (b)*. Bayley J. in the last mentioned case lays it

(a) 12 East, 359.

(b) 5 B. & Ald. 484; S. C. 1 D & R. 69.

down that, even where the removing parish consents to a supersedeas of their own order before appeal entered, still "the sessions may exercise a discretion, and enter the appeal or not, so as to best answer the purposes of justice." But I think even these words are to be qualified by what follows, "if the parties removing do not chuse to pay the expence of maintenance incurred previously to the supersedeas, they may then enter the appeal, for the purpose of compelling them to do so; if they are willing to do it, the sessions may refuse to enter the appeal." Where the costs of maintaining the pauper after removal have not been paid to the appellant parish there may remain something for the decision of sessions to operate upon.

I quite agree with the language of *Patteson J.* in the two cases referred to. It is a beneficial rule to lay down that where a good objection is pointed out to an order of removal, the respondents may bid adieu to it, and make another.

PATTESON J.—This rule is applied for mainly on the ground that the sessions have refused to hear for one specific reason, and that, although their decision may be supported by many good reasons, we are bound to interfere, if the reason they acted on is bad. The question is whether the sessions were right in refusing to entertain this appeal. *Mr. Baines* has alluded to what I said in two of the cases cited, and *Mr. Pashley* to what I said the other day in *Reg. v. Rishworth (a)*. What I said in *Reg. v. Rishworth* I said advisedly, for my observations in the two preceding cases had been made in passing, and I was desirous in the last case to avoid prejudging the question, which I knew would be raised in this case as to the general power of a removing parish to abandon an insufficient order. That question is now before us, and I think we should act very hardly by parishes if we were to say that they cannot cure a mistake by abandoning an order of removal which

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they find to be bad, and by making a fresh one. Before the Poor Law Amendment Act no communication was necessary between contending parishes respecting an order of removal. Now that communication is required for the purpose of preventing litigation, and it would be prejudicial to that purpose as well as strange, if, after it has been pointed out to the respondents in the course of such communication that their order is bad, they should be obliged to take the case to sessions and to increase costs. When an order of removal is sent under this statute, and notice of appeal against it is given within the twenty-one days after service, it cannot be said that the order is executed. It is true that here there had been an actual removal of the paupers under the order. Why? Because the parish removed to had neglected to give notice of appeal within the twenty-one days. It was the fault of the appellants that the order was acted upon, but still the removing parish, whether bound to do so or not, has in point of fact paid all expenses consequent upon the removal. The general question having now come before us, I do not hesitate to say that the respondents had a right to get their order superseded after the objection stated, and that no court of quarter sessions ought to enter an appeal against an order so superseded.

COLERIDGE J.—This is an attempt either to increase costs or to get rid of the merits, and I am glad that we may, consistently with law, defeat it. The order of removal was not objected to during the twenty-one days which are required to intervene before its execution by the actual removal of the paupers. Then notice of appeal against the order was furnished, and the respondents, finding one of the grounds of appeal to be irresistible, do all they can to set themselves right. They get the order superseded, and offer to defray all expenses which the appellants have been put to. Then behind the backs of the respondents this appeal is entered. If this case stood upon the rule of the sessions with respect to the mode of entering appeals

I should hesitate. I am doubtful whether it is a proper rule, and I agree that they cannot make such rules of practice as will vary the general law respecting these appeals. But, previously to the discussion on this rule of practice, there was another discussion on the effect of superseding an order of removal actually executed. The sessions decided that they had jurisdiction to try the appeal against an order superseded; they afterwards decided they had no jurisdiction, because their rules of procedure had not been observed. Now as it cannot be denied that the sessions might alter their decision at any time during the sessions, and they at last came to a right conclusion, it matters not whether they acted on good or bad grounds, their conclusion is right, and we are not bound to facilitate injustice by making this rule absolute. One word on the abandonment of orders of removal. I think the present state of the law makes it quite proper that there should be the right, which has been exercised in this case, of abandoning an order made on an insufficient examination, and I accede to all the observations of my brother *Patteson*.

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WIGHTMAN J.—In *Rex v. Justices of Norfolk, Bayley* J. expressed an opinion that the sessions had discretion, on account of costs, to enter an appeal, if they please, against an order of removal which had been superseded after execution, but added, that if the removing parties chuse to pay costs “the sessions may refuse to hear the appeal.” Here all expenses have been paid. It is said in this case that the sessions had at one time exercised their discretion, that they decided to hear the appeal, and afterwards rescinded their decision on insufficient grounds. We cannot go into that: for some reason or other they have determined the matter, and we may consider this as an application made to us to hear in the first instance.

Rule discharged.

Monday,
Nov. 22d.

DOE d. WYNHAM v. CAREW.

Ejectment was brought on the following proviso for re-entry in a lease, "that if the said lessee (the defendant) his executors administrators or assigns shall either by their or his own act or acts, or by bankruptcy, insolvency, writ of extent or of execution by fieri facias, or other act of law, or by any other means whereby either voluntarily or without his or their consent whereunder the said premises hereby demised or any part thereof would, in case that proviso did not exist, be liable to be seized by the sheriff or any other person or in case the said lessee his executors administrators or assigns shall at any time or times hereinafter make breach or default in performance of the covenants or any of them

THIS ejectment was brought on the following proviso for re-entry in a lease:—"that if the said *John Edward Carew* (the defendant) his executors administrators or assigns shall either by their or his own act or acts or by bankruptcy, insolvency, writ of extent or of execution, by fieri facias or other act of law or by any other means whereby either voluntarily or without his or their consent whereunder the said premises hereby demised or any part thereof would in case that proviso did not exist be liable to be seized by the sheriff or any other person, in case the said *John Edward Carew*, his executors, administrators or assigns shall at any time or times hereafter make breach or default in the performance of the covenants or any of them hereinbefore on his or their parts contained," then the lease was to be void and the lessor to re-enter. Forfeiture was alleged to have been incurred by the defendant suffering an execution by fi. fa. to be put in upon his goods on the premises demised. The cause was tried before *Gurney B.* at the *Sussex summer assizes, 1840*, when the plaintiff had a verdict, subject to a motion to enter a nonsuit, on the ground that the proviso was insensible.

A rule having been obtained,

Thesiger and *Petersdorff* now shewed cause, and, in support of the proviso, cited *Doe d. Davis v. Elsam* (a), *Coles v. Hulme* (b), *Lord Say and Seal's Case* (c), *Langdon v. Goole* (d), and they also mentioned *Doe d. Spencer v. Godwin* (e), *Doe d. Abdy v. Stevens* (f), *Doe d. Palk v. Marchetti* (g), contra.

(a) 1 M. & Malk. 189.

(b) 8 B. & C. 568; S. C. 3 M. & R. 86.

(c) 10 Mod. 46.

(d) 3 Lev. 21.

(e) 4 Mau. & S. 265.

(f) 3 B. & Ad. 299.

(g) 1 B. & Ad. 715.

hereinbefore on his or their parts contained," then the lease was to be void, and the lessor to re-enter:—*Held*, that the proviso was insensible.

Channell Serjt., *White*, and *Peacock* contra, were not heard.

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Lord DENMAN C. J.—We do not think ourselves bound to find out a meaning for the proviso.

WILLIAMS, COLERIDGE, and WIGHTMAN Js. concurred.

Rule absolute.

Saturday,
Nov. 25th.

The QUEEN, on the prosecution of WILLIAM SAGON PAGE the younger, v. The Master, Wardens and Assistants of the SOCIETY of SCRIVENERS of the City of London.

Where a person bound apprentice to a notary, who also carried on the business of an attorney in the same office, three or four years before the expiration of his apprenticeship was articulated also to the same master as attorney, and served under both contracts, the Court held, that service under the latter contract was not necessarily inconsistent with the complete service required by the Notaries' Act, under 41 G. 3, c. 79, s. 7, that it was a question of fact whether

THESE were two issues upon a writ of mandamus. The mandamus stated that the prosecutor was bound by indenture of apprenticeship to *William Sagon Page* the elder, a public notary, and that the prosecutor did serve for the full and complete term of seven years, and did continue and was actually employed by his said master in the proper business, practice and employment of a public notary during seven years, that he applied to become a member of the said Company, in order to become and practise as a notary in the city of London, and the defendants refused to admit him.

The defendants, after stating the provisions of the stat. 41 Geo. 3, c. 79, returned to the writ of mandamus that the plaintiff did not during the whole time and term of seven years continue to be nor was he actually employed by *William Sagon Page* the elder in the proper business, practice and employment of a public notary.

The prosecutor traversed the return by two traverses. 1. He alleged that he did continue for the term of seven

the notarial service had been bonâ fide performed, and, as it did not appear that the service as attorney's clerk had interfered with the service as notary's apprentice in the particular case, granted a mandamus to the Scriveners' Company to admit the apprentice a notary.

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years in the service of *W. S. Page* as a public notary as by the act required modo et formâ. 2. That he did during the whole time and term of seven years serve, and was during the term of seven years actually employed, in the proper business, practice, and employment of a public notary as required by the said act. On these traverses issues were joined. The pleadings were to form part of this case. The said issues joined in this case came on to be tried before *Maule J.* at the York Assizes, when a verdict was found for the crown, subject to the opinion of the Court on the following case:—

Before and on the 3d of April, 1828, and during all the time hereinafter mentioned, *W. S. Page* the elder was a public notary, duly sworn, admitted, and enrolled, and during all that time used and exercised the profession of a public notary. *W. S. Page* the elder also during all that time was an attorney and solicitor, and used and exercised the profession and business of an attorney and solicitor conjointly with that of a public notary in the same office at Scarborough in Yorkshire. The extent of the business of the said *W. S. Page* the elder was considerable in both the professions, the average amount of each being on the whole about equal to the other. His business as a public notary comprised all the usual details of notarial practice, such as noting and extending protests, preparing and attesting powers of attorney, average statements, and other instruments for the purpose of being sent abroad, noting and protesting bills of exchange, and other business of the like kind. On the 3d of April, 1828, *W. S. Page* the younger was bound by the indenture of apprenticeship mentioned in the writ of mandamus to serve as a clerk or apprentice for and during the space of seven years to *W. S. Page* the elder, in the said profession and business of a public notary, as in the writ of mandamus mentioned. On or about the 22d November, 1832, *W. S. Page* the younger was in due manner bound to *W. S. Page* the elder as an articulated clerk in the profession and business of an attorney

and solicitor. *W. S. Page* the elder carried on the businesses and professions of a notary public and attorney and solicitor in the same office, and *W. S. Page* the younger, and another clerk in the said office, were employed in both businesses, according to the wishes and directions of *W. S. Page* the elder, who personally managed and superintended the whole. At the time of the execution of the indenture of the 3d April, 1828, *W. S. Page* the younger was in the actual service of the said *W. S. Page* the elder, in his said office, in the said professions and businesses, and thenceforward served *W. S. Page* the elder as an attorney's clerk as well as his clerk as a notary, and was employed as much in one of those businesses as in the other until the 22d of November, 1837. During the said term of seven years *W. S. Page* the elder occasionally attended the York Assizes to conduct causes and prosecutions at York, distant forty miles from Scarborough, and there stayed on such business of an attorney for several days. On some of these he took *W. S. Page* the younger with him to York to employ and did there employ him as an attorney's clerk. *W. S. Page* the younger, in pursuance and by virtue of his said service as an articulated clerk to *W. S. Page* the elder, in the profession and business of an attorney, was on or about the 23d of November, 1838, in due manner admitted an attorney of her Majesty's Court of Queen's Bench, and is now practising as such attorney, and for the purpose of his admission he made the following affidavit. [The case then set out the affidavit, deposing to the service of the deponent as attorney's clerk to his father, from the date of the above articles to the 22d of November, 1837.]

The Court is to be at liberty to draw any inference or conclusion from the facts which it may seem fit to them to draw. If the Court should be of opinion that the verdict should be entered for the crown, then the verdict is to be entered accordingly; but, if the Court should be of a contrary opinion, then the verdict is to be entered for the said

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 The QUEEN
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Master, Wardens and Assistants of the Society of Scriveners of the city of London.

The case was now argued by Sir *W. W. Follett* S. G. (who cited *Rex v. The Scriveners' Company (a)*, and *In re Taylor (b)*), for the prosecutor; and by Sir *F. Pollock* A. G. for the defendants.

Cur. adv. vult.

Lord DENMAN C. J., on the last day of this term, delivered the judgment of the Court as follows:—This was a mandamus to admit the prosecutor as having served his whole time to a notary at Scarborough. The return made by the company was that he had not so served in the terms of the 7th sect. of 41 *Geo. 3.* On this averment issue was joined and tried at York before *Maule* J. The verdict was taken for the crown, subject to a special case which has been argued before us. The substance of the statement was, that during the last five years of his service as a notary he had also served the same master, his father, as an attorney; the company alleging that the service with a notary cannot be such as the act requires, if it be accompanied by a different service under another contract, the full execution of which might occupy the whole term, and interfere with that required for a notary.

But, after consideration, we are of opinion, that this is a question of fact, and that if the master really carried on the business of a notary, and the service was *bonâ fide* performed whenever it was wanted in that business, the qualification described in the act has been obtained; such service being neither incompatible with the enjoyment of some leisure, nor with considerable attention to other studies. The Attorney General admitted in his argument that the service with a notary may be complete, though the party should engage in literary works demanding the daily devotion of some hours, or should undertake to give mathe-

(a) 10 B. & C. 511; S. C. 5 M. & R. 543. (b) 5 B. & Ald. 538.

mathematical lessons, meaning no doubt both a contract and a service subordinate to the binding with a notary on which the qualification is claimed, and never in fact interfering with them. If this may be, we can discover no reason why service with an attorney, not impeding that performed with a notary, should render it incomplete. The business of a notary, far from tending to estrange the mind from legal pursuits, may be truly said to fall within that description, and a general knowledge of an attorney's profession would be favourable to the instruction of a notary. Yet it would follow from the arguments urged against this application, that a young man might transact for five years all the business of an attorney's office, and during seven fulfil all the duties charged upon a notary, without becoming qualified to act as a member of either profession.

We do not consider this judgment as clashing with any of the authorities, nor feel any desire to introduce a looser practice. We fully agree with what we conceive to be the principle that guided Lord *Tenterden* and this Court in deciding *Ex parte Taylor* (a) and the case of *Rex v. Scriveners' Company* (b); where two co ordinate obligations exist at once, and the time is not really at the employer's command throughout his period of service, the words of the statute, according to their true meaning, are not satisfied. But we find nothing in the facts here particularised which lead us to the conclusion that such was the case in the present instance. It seems therefore to us that our judgment ought to be given for the crown.

D.

Judgment for the crown.

(a) 5 B. & Ald. 538.

(b) 10 B. & C. 511; S. C. 5 M. & R. 543.

1841.

Thursday,
Nov. 18th.

FALCON and another v. BENN.

Under a plea of payment, in assumpsit, averring under a videlicet that the defendant paid a certain sum in satisfaction &c. the precise sum is immaterial, and he is only bound to prove payment of as much as will cover any demand established against him.

ASSUMPSIT. The first count of the declaration stated that the plaintiff had built a ship for the defendant, according to a special contract set out, at 13/. 10s. per ton, and that though the defendant had paid part of the purchase money he had not paid the residue &c.

Indebitatus counts for work and labour, for interest, and on an account stated.

Fifth plea, that after the making of the promises, and before the commencement of the suit, the defendant paid to the plaintiffs, and the plaintiffs then accepted of the defendant, a large sum of money, to wit, 50,000*l.* in satisfaction &c. Verification.

Replication, that the plaintiffs did not accept of the defendant the sum of money in that plea mentioned, in such satisfaction as therein mentioned, modo et forma. Conclusion to the country.

Issue thereon.

At the trial before *Wightman J.* at the Lancaster Summer Assizes, 1841, the defendant proved payment of a sum of about 4000*l.*, and the jury, under the direction of the learned judge, found a verdict for the defendant on the above issue.

Dundas on a former day in this term (*a*) moved for a new trial on the ground of misdirection, because the plea of payment of 50,000*l.* ought to have been made out by proof of payment of that specific sum. If the sum was material, the averment under a videlicet will not render it immaterial, and the sum appears to be material from several cases. He then referred to *Cousins v. Paddon* (*b*), *Tuck v. Tuck* (*c*), *Moore v. Butlin* (*d*); and to *Marks v. Laheè* (*e*)

(*a*) Nov. 6th, before Lord Denman C. J., *Williams, Coleridge* and *Wightman J.*

(*b*) 2 C., M. & R. 547.

(*c*) 5 M. & W. 109.

(*d*) 7 A. & E. 595; S. C. 2 N. & P. 436.

(*e*) 3 Bing. N. C. 408; S. C. 4 Scott, 137.

as to a plea of tender. [*Wightman J.* Under a plea of tender the sum is brought into Court.]

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Cur. adv. vult (a).

LORD DENMAN C. J. now delivered the judgment of the Court.—In respect of the fifth plea, the defendant proved payment of as much as the plaintiffs were entitled to at the rate per ton mentioned in the agreement, according to the dimensions specified in the agreement, but it was said that the defendant having alleged payment of a certain sum, to wit, 50,000*l.*, was bound to prove payment of that precise sum, but we are clearly of opinion that he was only bound to prove as much as covered any demand established on the part of the plaintiffs; if he does that, any excess becomes wholly immaterial, and the precise amount of the sum laid under the *videlicet* becomes immaterial also. This is consistent with the cases of *Cousins v. Paddon* (*b*) and *Tuck v. Tuck* (*c*), and several other cases that might be referred to, and with the general doctrine as to the materiality of sums laid under a *videlicet*, where the precise amount is not material to the issue.

D.

Rule refused.

(a) The Court did not seem to reported.

doubt as to this point, but took (b) 2 C., M. & R. 547.

time to consider another point, not (c) 5 M. & W. 109.

COATES v. BIRCH.

DEBT against the sheriff for the escape of a prisoner in execution.

At the trial before *Wightman J.*, at the Liverpool summer assizes, 1841, in order to entitle the plaintiff (after notice to produce) to give secondary evidence of the warrant

question, put for the purpose of letting in secondary evidence, whether the document is in his possession.

*Saturday,
November 6th.*

An attorney, although he has received a document from his client, is not privileged from answering a

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under which the prisoner had been taken, the defendant's attorney was called on behalf of the plaintiff and asked whether he had the warrant under which the prisoner was taken. The defendant's counsel then interposed, and asked whether the witness had any papers relative to the cause, except such as came into his hands as attorney for the defendant. The witness said he had not. Upon this the defendant's counsel objected that the witness was privileged, and not obliged to say whether he had the warrant. The learned judge overruled the objection, reserving the point; and on the witness saying that he had the warrant, and declining to produce it, secondary evidence of its contents was admitted, and the plaintiff obtained a verdict.

Cresswell now moved for a nonsuit, on the ground that the evidence of the defendant's attorney had been improperly received. The witness's only knowledge of the existence of the warrant was acquired in his capacity of attorney to the defendant, and it was of course in the same capacity that he acquired possession of the warrant. In *Robson v. Blakey* (a) it was held that, where an attorney has come to the knowledge that a deed or instrument has been destroyed from the circumstance of his having been employed as attorney to one of the parties, he cannot be asked as to the fact, the knowledge of which was so obtained; Lord *Ellenborough* C. J. saying, "This is a transaction with which the party has only become acquainted from being employed as attorney. The act cannot be stripped of the confidence and communication as an attorney, the witness being then acting in that character. One sense is privileged as well as another. He cannot be said to be privileged as to what he hears, but not to what he sees, where the knowledge acquired as to both has been from his situation as an attorney." [*Wightman* J. In *Bevan v. Waters* (b), notice to produce a particular letter had been served, and the plaintiff's counsel asked the defendant's attorney whether

(a) 5 Esp. 52.

(b) 1 M. & M. 234.

he had that letter in his possession, and “ *Best* C. J. said that he recollected that Lord *Mansfield* had decided that an attorney was bound to answer the question; the object was to let in secondary evidence, in case it was not produced; and therefore he thought the question right to be answered.”] That case seems contrary to principle; it can make no difference whether the witness is asked as to his having a letter in his possession, or merely as to his having seen it; his hands are his client’s as much as his eyes.

Lord DENMAN C. J.—I never understood the privilege extended so far as is now contended on behalf of the defendant, and, as there is a case in point, we will not raise a doubt by granting a rule.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

D.

Rule refused.

WILLIAMS v. JONES.

DEBT for work and labour performed by the plaintiff as solicitor for the defendant.

Fifth plea, as to the sum of &c. parcel &c. that the plaintiff actionem non &c., because the cause of action as to the said sum accrued to the plaintiff as and in the character of the defendant’s solicitor, and under colour that the plaintiff was a solicitor in the High Court of Chancery in bringing, prosecuting, and defending divers actions, suits, and proceedings in equity in the Court of Chancery as the solicitor of and for the now defendant. Averment, that at the time of the accruing of the said cause of action the plaintiff was not a solicitor in the Court of Chancery, *duly admitted and inrolled* in that behalf, according to the form of the statutes in that case made and provided, *nor quali-*

fication at the time of doing the work, instead of at the time of the cause accruing.

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COATES
v.
BIRCH.

Friday,
Nov. 12th.

A plea, to an action by a solicitor for work and labour in divers suits, that the plaintiff was not admitted *and* inrolled, *nor* qualified or authorised to act as solicitor at the time of the accruing of the cause of action, *Held* bad, for duplicity, and also on the ground that the plea should have alleged the want of qualification

ction

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fied or authorised according to law to act or practise as a solicitor therein. Verification &c.

Special demurrer on the following grounds:—That the plea is ambiguous and uncertain, in not distinctly shewing the ground of defence intended to be set up thereby; and that it cannot be collected therefrom whether the defendant means to rely upon the fact of the said cause of action, and therein pleaded to, having accrued under colour of the plaintiff being a solicitor when, as therein alleged, he was not one, as shewing a fraud or misrepresentation on the part of the plaintiff, or whether the plea is merely intended to set up the illegality of the plaintiff's acting as solicitor by reason of the statutes in such case made and provided, and that, if the plea is intended as setting up fraud or misrepresentation on the plaintiff's part, it is bad for not stating the same and the circumstances thereof with sufficient certainty, so as to enable the plaintiff to traverse it. That, if it is to be taken as a plea of the illegality of the plaintiff's acting as a solicitor, it is bad for not stating how and in what respect the admittance and inrolment of the plaintiff, or one of them, were or was illegal; that, if it is to be taken as a plea setting up both those defences, it is *double*.

That the said plea does not shew any defence to the action in this, that it only states the plaintiff was not qualified or authorised to act as a solicitor *at the time of the accruing of the cause of action* therein pleaded to, instead of stating that he was not so qualified or authorised at the time when he did and preformed the work and labour therein pleaded to, and it is consistent with the plea that the plaintiff was duly qualified and authorised to act as a solicitor when he did and performed the said work and labour, though not so at the time when the causes of action in respect thereof accrued to him.

That it is ambiguous and uncertain on the face of the plea whether the plaintiff was or was not duly qualified and

authorised to act as a solicitor when he did and performed such work and labour.

That the plea tenders an issue upon matter of law in this, that it states that the plaintiff was not *duly* admitted and inrolled, and for that the introduction of the word "*duly*" into the averment improperly qualifies the same, and makes the same ambiguous, and a negative pregnant in this that it is uncertain whether it is intended thereby to deny altogether such admittance and inrolment, or to admit that the plaintiff was in fact admitted and inrolled, and to insist upon some irregularity or illegality in such admittance and inrolment, or one of them.


That the plea also improperly tenders an issue on a matter of law in this, that it states that the plaintiff was not qualified or authorised according to law to act or practise as a solicitor, &c.

That such last-mentioned averment is improper and multifarious in this, that it involves all the species of illegality and disqualification which could prevent the plaintiff from practising as a solicitor, and it, together with the previous allegation, that the plaintiff was not duly admitted and inrolled, makes the plea double, because under these two allegations different defences might be proved, one arising out of the insufficiency of the plaintiff's admittance and enrolment, or one of them, and the other arising out of the plaintiff's being otherwise disqualified from acting as a solicitor, though admitted and inrolled, &c.

Kelly in support of the demurrer. The plea is bad on several grounds. 1. It states that the plaintiff was not qualified when the cause of action accrued, instead of when the work was done, which is the only point of time that is material. The work might have been done on credit, in which case the plaintiff might have been qualified at that time, although not so at the subsequent time when the cause of action accrued. 2. The plea is multifarious in stating that the plaintiff was not duly admitted and inrolled

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nor qualified. In *Eyre v. Shelley* (a) it was held that a plea, that an attorney had not obtained or entered the certificate required by law, was open to a special demurrer for duplicity. If this plea is allowable, it might have equally embraced any other statutable disqualification, as that at the time in question the plaintiff was a prisoner, and so disqualified under 12 Geo. 2, c. 13, s. 9. The want of inrolment of itself disables an attorney from recovering his costs: *Humphreys v. Harvey* (b); or the want of admission: *Latham v. Hide* (c).

3. The plea, in alleging that the plaintiff was not *duly* admitted and inrolled, involves matter of law. In *Eyre v. Shelley*, already cited, the plea that the plaintiff had not obtained or entered the certificate required by law was thought bad for describing the certificate, not in the words of the statute, but by words involving its legal operation and effect. So in *Hume v. Liversedge* (d), a plea to a declaration on a bail bond, that no *proper* affidavit of debt was filed, and in *Rex v. The Mayor of Lyme Regis* (e), a return to a mandamus, that the prosecutor was not *duly* elected, admitted, and sworn, were held bad; and in *Ransford v. Copeland* (f), a plea that the plaintiffs were a banking company of more than six persons, and that they were illegally associated together, was held to be compounded of law as well as fact. *Webb v. James* (g) is an authority on the same point.


Cresswell contra. 1. By the ordinary rule of law the right of action accrues immediately after the work done, and any special circumstances which constitute an exception to that rule will not affect the validity of this plea.

2. The plea is not double in denying that the plaintiff was not admitted and inrolled. The plea sets up one entire

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| (a) 6 M. & W. 269. | (d) 1 C. & M. 332. |
| (b) 1 Bing. N. C. 62; S. C. 4 | (e) 1 Doug. 79. |
| M. & Scott, 500. | (f) 1 N. & P. 671. |
| (c) 1 Dowl. P. C. 594. | (g) 7 M. & W. 279. |

statutable defence, depending upon the absence of one entire qualification, and the further allegation that the plaintiff was not "qualified or authorised according to law" is merely the result which is involved in the previous allegation as to the want of admission and enrolment. The fact of the plaintiff being a prisoner cannot be involved in the plea, for an attorney might recover for work done while a prisoner, although he is prohibited to act while a prisoner. [*Coleridge J.* Can he recover, when the act says that all proceedings taken by him while a prisoner shall be void?] At all events, the plea cannot include that or any other *disqualification*, for it merely states that he was not qualified, and evidence that the plaintiff was a prisoner would not be admissible under it.


3. The word *duly* does not involve matter of law. The allegation would be satisfied by proof that the plaintiff was admitted and enrolled in fact. In *Rex v. The Mayor of Lyme Regis* (a) the judgment proceeded upon the return being in the conjunctive, Lord Mansfield C. J. saying, "the return is in the conjunctive—not duly elected, admitted, and sworn—and therefore fallacious. If the truth would have warranted it, and they had returned not duly elected, or admitted, or sworn, it might have been good." In *Hume v. Liversedge* (b) the plea was not that no affidavit was properly or duly filed, but that no *proper* affidavit was filed, and clearly therefore put in issue whether the affidavit filed was or was not proper. Where a franchise was claimed through the attainder of *B.*, "it is sufficient to say that *B.* fuit debito modo attinctus." In truth, as was argued in *Nightingale v. Wilcoxson* (c), where the declaration stated the writ to have been duly indorsed for bail, the word "duly" necessarily imports no more than is expressed by the subsequent words affixed to that adverb; and this construction of the word "duly" was acted upon in *Williams*

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(a) 1 Doug. 79.

(b) 1 C. & M. 332.

(c) 10 B. & C. 207; S. C. 5 M. & R. 169.

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 v.
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v. *Germaine* (a) where the declaration averred that a bill had been "duly" presented.

Kelly was not called upon to reply.

Lord DENMAN C. J.—I am of opinion that this plea is bad. It is clearly double, for, even if admission and inarrestment are so far the same that one involves the other, yet the additional statement, that the plaintiff was not "qualified nor authorised according to law to practise as a solicitor," may involve additional matters, and my brother *Coleridge* has pointed out one, in the case of a solicitor being in prison when the work for which he sues was performed.

Then with respect to the time when it is alleged the plaintiff had no qualification, namely, the time when the cause of action accrued, we do not know when the cause accrued—it might not have accrued until a long time after the work was done. If the plaintiff was qualified when he did the work, it would be immaterial whether he was qualified when he brought the action.

WILLIAMS, COLERIDGE and WIGHTMAN Js. concurred.

D.

Judgment for the plaintiff.

(a) 7 B. & C. 468; S. C. 1 M. & R. 394.

The QUEEN v. STODDART (b).

A party who appears at the petty sessions on the charge of being putative father,

ON application by the guardians of the Cockermonth Union to the Cumberland Quarter Sessions, in Easter, 1840, for an

(b) Decided at the sittings after Easter Term last (May 10).

and desires to have his case heard at the quarter sessions, and enters into a recognisance under 2 & 3 Vict. c. 85, s. 3, reciting that he had due notice to appear at the petty sessions, is bound by that recital, and cannot afterwards, on the hearing at the quarter sessions, object that in fact such notice was not given.

order of maintenance upon the defendant, in respect of a bastard child, born in December, 1839, the sessions granted the order, subject to the following case:

The recognisance of *Joseph Stoddart* (the defendant) having been put in in the form after mentioned, his counsel called upon the applicants, before going into the merits of the case, to prove that a proper notice, duly signed by the guardians of the said union, had been duly served upon him, according to the statute in that case made and provided. The counsel for the applicants contended that the applicants were not bound to prove at the quarter sessions that notice had been given to appear at the petty sessions, or that such notice was duly signed or duly served; and that all the statute required, when the case was taken to the quarter sessions, was the putting in the recognisance of the putative father. The bench were of this opinion, and made the order of maintenance, no proof having been given at the quarter sessions of any such notice to appear in petty sessions, or of the service or the sufficiency of such notice.

The recognisance, which bore date the 24th of February, 1840, recited, that at a meeting of the guardians of the Cockermouth Union, held on the 10th February, 1840, a notice in writing, under the hands of a majority of the guardians, was duly given, directed to the said *Stoddart*, whereby, after reciting the birth of the child and chargeability, &c. &c. the said *Joseph Stoddart* was thereby directed to take notice that the said guardians did intend, on the 24th February then instant, to apply to the justices of the peace at the petty sessions, which would be then holden by them at &c., for an order by him to reimburse the union for the maintenance and support of the said child. The recognisance then proceeded—"And whereas, on the 14th February, 1840, the said *J. Stoddart* was duly served with the said notice; and whereas, on the said 24th February, the said *J. Stoddart* duly appeared at the said petty sessions, in pursuance of the said notice, to answer the charge &c., when and where he did declare to the said justices assembled at such petty ses-

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sions, that he was desirous that the said charge should be heard and determined at the next general quarter sessions of the peace, and did then and there, together and along with two sufficient sureties, enter into this present recognisance, according to the form of the statute," &c. The condition was in the usual terms, that the defendant should appear at the next quarter sessions, to answer the charge and abide the judgment of the Court, and pay all costs, in case he should be adjudged the putative father.

W. H. Watson, in support of the order of sessions, relied upon *Reg. v. Justices of Wiltshire (a)*, as deciding the very point that, where a party, charged as the putative father, appeared at the petty session, and then under 2 & 3 Vict. c. 85, s. 3, entered into his recognisance and removed the case to the quarter sessions, he could not at the latter sessions object that he had not had proper notice for the petty sessions. (He was then stopped.)

Greaves contra. It appears from the recognisance in the case cited that the putative father "heard the said information, application and charge," before he declared his desire to have it heard at the quarter sessions, so that he had waived objection to the notice by entering upon his case. Here the defendant appeared merely for the purpose of removing the case. The statutes require that due notice should be given the putative father before his case is *heard*. If he has not had due notice when his case comes on for hearing at the quarter sessions, he has a right then to take the objection. He must have some opportunity of objecting. Where he removes his case to the quarter sessions, he has a right to the opinion of that Court on the whole case. A party ought not to be bound by the recitals of a recognisance, which is always drawn up behind his back.

Lord DENMAN C. J.—A technical objection may fairly

(a) 4 P. & D. 406.

be met by a technical answer. We must take the recognisance to be that into which he voluntarily entered, and he is bound by the statement.

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PATTESON and WILLIAMS Js. concurred.

D.

Order of Sessions confirmed.

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The DUNDALK WESTERN RAILWAY COMPANY
 v. TAPSTER (a).

DEBT for calls. The declaration stated that the defendant heretofore, to wit, on 1st August, 1839, then being a proprietor of divers, to wit, ten shares in the undertaking mentioned in 1 *Vict.* cap. xcvi. (local, personal and public), being an act for making and maintaining a railway from the town of Dundalk, in the county of Louth, to the town of Ballybay, in the county of Monaghan, was indebted to the said Company in a large sum of money, to wit, the sum of 50*l.* for divers, to wit, two calls of 2*l.* 10*s.* each call upon each of the said shares in the said undertaking, belonging to the defendant, whereby and by reason of the non-payment thereof an action hath accrued to the said Company, by virtue of the aforesaid act of parliament, to demand and have of and from the defendant the sum of 50*l.* above

Where a plea is demurred to, which in form is a plea in abatement, but discloses matter that might be pleaded in bar, the defendant may object to the declaration.

The Dundalk Railway Company's Act (1 *Vict.* cap. xcvi.) s. 75, enacts, that it shall be lawful for the directors to recover the amount of calls in any of

(a) Decided at the sittings after Easter Term last (May 10).

her Majesty's Courts of Record in Dublin, by action of debt, and sect. 77 gives them a general form of declaration, that the defendant is indebted to the Company for calls, whereby an action hath accrued, &c. without setting forth the special matter.

To a declaration in such form the defendant pleaded, "the defendant in his own person comes and says, that this Court ought not to have cognisance of the action," &c. because it is enacted that it shall be lawful for the Company to sue for calls in any of her Majesty's Courts of Record in Dublin, and he was liable to be sued in those Courts, and not elsewhere, "wherefore he prays judgment, whether this Court can or will take further cognisance of the action."

Held, on demurrer to this plea, that it contained matter in bar, although it was in form a plea to the jurisdiction, and that the defendant was at liberty to impeach the declaration; and that the declaration was bad, as the remedy given by the act had not been adopted, and the Company had no right, at common law, to declare in this form.

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demanded. Yet the defendant, although often requested so to do, has not as yet paid the sum of 50*l.* above demanded, or any part thereof. To the damage, &c.

Plea: the defendant in his own person comes and says, that this Court ought not to have or take further cognisance of the action aforesaid, because he says that in and by the act of parliament in the declaration mentioned, it is (a) enacted and provided, amongst other things, that the directors therein mentioned shall have power from time to time to make such calls of money from the proprietors of said undertaking, to defray the expenses of or to carry on the same, as they from time to time shall find necessary for those purposes, so that no such call shall exceed the sum of money therein mentioned, and that every owner of any share in the said undertaking shall pay his rateable proportion of the monies to be called for as aforesaid, to such persons and at such times and places as the said directors shall from time to time direct and appoint; and, if any owner of any such share shall not so pay such his rateable proportion, then and in such case, and so often as the same shall happen, such owner shall pay interest, after the rate of 6*l.* per cent. per annum, from the day appointed for the payment thereof, up to the time when the same shall be actually paid. And if any owner of any such share shall neglect or refuse so to pay such his or her rateable proportion, together with the interest, if any accrued for the same, for the space of two calendar months after the day appointed for the payment thereof, then it shall be lawful for the said Company, or for the said directors, to sue for and recover the same, in any of her Majesty's Courts of Record in Dublin, in manner in the said act mentioned. That before and at the time of making the said calls in the declaration mentioned, and before and at the time of commencing this suit, he the defendant was such proprietor of shares, as in the declaration and in the said act of parliament mentioned, and that he then was and still is subject and liable to be

(a) By section 75.

sued, upon and for and on account of and in respect of the causes of action in the said declaration mentioned, in her Majesty's said Courts of Record in Dublin, and not otherwise or elsewhere, and this the defendant is ready to verify, &c. Wherefore he prays judgment, whether this Court can or will take further cognizance of the action aforesaid.

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Demurrer: and the plaintiffs say that, notwithstanding anything above pleaded by the defendant, the Court here ought to have further cognizance of the action aforesaid, because they say the said plea and the matter therein contained are not sufficient in law to oust the Court here from having or taking further cognizance of the aforesaid action, and that they the plaintiffs have no occasion, nor are they bound by the law of the realm to answer said plea in manner and form as the same is above pleaded, and this they are ready to verify. Wherefore they pray judgment, and that this Court will have and take further cognizance of said action, and that the defendant may answer over to the declaration of the plaintiffs.

The points set down by the plaintiffs were "the plaintiffs intend to argue that the defendant's liability to be sued upon and for the causes of action in the declaration mentioned is not limited by the statute to the Courts of Record in Dublin, and that by law, as well as by the said statute, this Court has jurisdiction over the causes of action in the declaration mentioned, and is not deprived of such jurisdiction by the said statute or otherwise."

The defendant's points were, "the defendant will object to the declaration, and will contend that, even if he be liable to an action in this country, the declaration must shew consideration for the debt."

Cleasby in support of the demurrer. The plea is bad; the jurisdiction of this Court over the subject of the suit is not ousted by the 75th section; and the declaration, which follows the general form given by the 77th section, is good. The 77th section enacts that, in "*any* action" (not "*such*"

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action so that it can be said that the form of declaration is confined to actions brought in the Courts of Dublin) "to be brought by the said Company, or by the said directors, against *any* proprietor of any share," to recover the amount of calls, the general form of declaration may be used. The defendant will rely on the words of the 75th section, stated in his plea, that, where a person neglects to pay his calls, "then *it shall be lawful* for the said Company, or for the said directors, to sue for and recover the same, *in any of her Majesty's Courts of Record in Dublin*, by action of debt," &c. But this action is not brought upon that clause, but upon the 74th, which enables the Company to sue subscribers for calls "in *any* court of law or equity." [Patteson J. The difficulty is, that you could not sue at all at common law, either in Dublin or elsewhere. If you sue, must you not pursue the very remedy pointed out by the act?] The Company are a corporation. [Patteson J. That may give rise to another question, as to the right of a corporation to sue one of its members.] The question of the validity of this declaration cannot arise upon a demurrer to a plea to the jurisdiction. The declaration is not demurred to, and, even if it were bad on general demurrer, it would be altogether foreign to the present issue, which is, whether this Court can take cognisance of the subject-matter of this action. "Generally speaking," observed Ashhurst J. in *Cates v. Knight* (a), "this Court cannot be ousted of its jurisdiction but by express words, or by necessary implication;" and in that case the implication was made for the advancement of justice. No such implication arises here. The 75th section says, it shall be lawful to sue in Dublin, but it does not say "and not elsewhere;" and, if the party is resident in this country, how is he to be sued in Dublin? The 74th section states generally that calls may be recovered "in *any* court of law or equity," and the 77th section gives the general form of declaration in *any* action, neither of these sections limiting the proceeding to the

(a) 3 T. R. 445.

Courts of Dublin, mentioned in the intervening section. "In all pleas to the jurisdiction of the *superior* Courts, it must be shewn that there is another court in which justice may be effectually administered, for, if there be no other mode of trial, that alone would give the superior Court jurisdiction. In *transitory* actions it was necessary to aver, in a plea that a county palatine ought to entertain the suit, either that the defendant dwelt in the county palatine, or that he had sufficient goods and chattels there, by which he might be attached, otherwise the plea could not be allowed, lest a failure of justice should ensue:" 1 *Chitty* (a), Pl. 445, citing *Carth.* 355. This plea, it is to be observed, is a plea to the jurisdiction of a superior Court in a transitory action, on the ground that the Court has no jurisdiction over the subject-matter. There is no instance of such a plea to the jurisdiction. The matter of this plea is matter for a plea in bar, and not for a plea to the jurisdiction: *Parker v. Elding* (b), *West v. Turner* (c). If there had been a clause in the act that no action for calls could be maintained in any court at Westminster, this could not have been matter of plea to the jurisdiction, for a plea to the jurisdiction does not allege that such an action is not maintainable at all in the superior courts, but rather that under certain exceptional circumstances the defendant has a right to have the action tried in some other court, if he thinks proper.

Kelly contra. It is said that on a demurrer to a plea in abatement it is not competent to the defendant to impeach the declaration. But the present plea, notwithstanding its form, discloses matter that is a bar to the action, and the defendant has therefore a right to make all such objections to the declaration as would be open to him on general demurrer to it. The authorities on this point are collected in *Archbold's Pleading and Evidence*, 314 (d), where it is said,

(a) 9th ed.

(b) 1 East, 352.

(c) 6 A. & E. 614; S. C. 1 N. & P. 612.

(d) 2d ed.

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"If the plaintiff demur to a plea in abatement, the defendant shall not take advantage of any defects in the declaration—*Lutwyche*, 1592, 1667; 1 *Salk.* 212; *Carth.* 172—*unless* the matter of the plea be such that it might have been pleaded in bar: *semble, Lutwyche*, 1604." But, even if this plea be taken as a plea to the jurisdiction, it is good. The declaration is clearly bad, for the right of action is altogether the creature of the statute, and the statute has not been followed. There can be no common law right in one partner to sue another, nor in a corporation to sue one of its own members. The defendant is substantially one of the plaintiffs on the record, for he is a member of the Company suing: *Bailiffs of Godmanchester v. Phillips (a)*. (He was then stopped.)

LORD DENMAN C. J.—The right and the remedy are both the creatures of the act, and the remedy given by the act must be pursued. We adopt the authority of *Lutwyche*; though this plea is in some sense a plea in abatement, it discloses matter which might be pleaded in bar, and the declaration is open to the objections which have been taken.

PATTESON, WILLIAMS and WIGHTMAN Js. concurred.

D.

• Judgment for the defendant.

(a) 4 A. & E. 551; S. C. 6 N. & M. 211.

END OF MICHAELMAS TERM.

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SITTINGS AFTER MICHAELMAS TERM.

DOE *d.* MYATT *v.* The SAINT HELEN'S and RUNCORN
GAP RAILWAY COMPANY.

Friday,
Nov. 26th.

EJECTMENT to recover "the undertaking in the Company's acts respectively mentioned, and all and singular the rates, tolls, and other sums arising by virtue of the same acts respectively, and all the estate, right, title and interest of the Company of, in, and to the same."

The lessor of the plaintiff claimed as mortgagee for a sum of 300*l.* lent by him to the Company on the security of the undertaking, and the question was whether the land of the Company was included in the mortgage.

The Company was established by 11 *Geo.* 4, c. lxi. (local, personal, and public), intituled, "An Act for making a Railway from the Crowley Hill Colliery, in the parish of Prescott, to Runcorn Gap in the same parish, (with several branches therefrom), all in the county palatine of Lancaster, and for constructing a wet dock at the termination of the said railway at Runcorn Gap aforesaid." Section 75 of that act enacted "that, in case the money hereby authorised to be raised by subscription as hereinbefore mentioned, shall be found insufficient for the purposes of this act, it shall be lawful for the said Company, by order of any general or special general meeting of the said Company, from time to time to borrow and take up at interest any further or additional sum, not exceeding in the whole the sum of 30,000*l.* on the credit of the said undertaking, as to them shall seem proper; and the said Company, or the directors of the said Company, after an order shall have been made for that purpose by any general meeting, are hereby authorised and empowered to assign and charge the property of the said undertaking, and the rates, tolls, and other sums arising or

By s. 75 of 11 *Geo.* 4, c. 51, the St. Helen's Railway Company's act, the Company "may assign and charge the property of the undertaking and the rates and tolls" as a security for money borrowed under the act, and a form of mortgage is there given, assigning "to A. B. his executors, administrators and assigns, the said undertaking, and all and singular the rates, tolls, and all the estate, right, title, and interest of in and to the same." *Held*, that a mortgage in the prescribed form did not pass any of the Company's lands.

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to arise by virtue of this act, or any part thereof, (the costs and charges of assigning the same to be paid out of such rates, tolls, or sums), as a security for any such further sum of money to be borrowed as aforesaid, with interest to or for the benefit of the party, or to his or her trustee who shall advance the same, all which *said mortgages*, assignments, or charges, shall be made under the common seal of the said Company in the words or to the effect following, or with such variation therein as the circumstances of the loan may render necessary (that is to say).

“The Saint Helen’s and Runcorn Gap Railway Company,
 Number .

“By virtue of an act passed in the 11th year of King George the 4th, intituled [*here set forth the title of this act*], we the Company of proprietors of the Saint Helen’s and Runcorn Gap Railway, incorporated by and under the said act, in consideration of the sum of , to us in hand paid by A. B. of , do assign unto the said A. B. his *executors*, administrators, and assigns, *the said undertaking*, and all and singular the rates, tolls, and other sums arising by virtue of the said act, and all the estate, right, title, and interest of, in, and to the same, to hold unto the said A. B. his executors, administrators and assigns, until the said sum of £ , together with interest for the same after the rate of for every 100*l.* for a year, shall be fully paid and satisfied. Given under our common seal this day of

A.D. .”

And the respective parties to whom such mortgages or assignments shall be made, shall without preference be entitled one with the other to the proportions of the said rates, tolls, and sums, and premises, according to the respective sums in such mortgages or assignments mentioned to be advanced, without any preference by reason of priority in date of any such mortgage or assignment or on any other account whatsoever;” “and all persons to whom any such mortgage or assignment shall have been made as aforesaid, or who shall be entitled to the money due thereon,

may from time to time transfer their respective rights and interests therein to any other person, and every transfer thereof shall and may be in the words or to the effect following, (that is to say)—

“ I *A. B.* of in consideration of the sum of £
paid by *C. D.* of do hereby transfer *a certain mortgage*, number made by the Company of proprietors of the Saint Helen's and Runcorn Gap Railway, to *E. F.* bearing date the day of , for securing the sum of and interest, in and to the money thereby secured, and in and to the rates, tolls, and other sums and *property thereby assigned* to the said *C. D.* his executors, administrators and assigns. Dated this day of A.D. .”

Section 59 contained the usual clause enabling the Company to sell lands not wanted for the purposes of the act.

On the 10th December, 1833, the Company had by deed poll assigned to the lessor of the plaintiff, “ his *executors administrators and assigns*, the said undertaking, and all and singular the rates, tolls, and other sums arising by virtue of the several acts, and all the estate, right, title and interest of, in and to the same, to hold to him his *executors, administrators and assigns*,” until the above mentioned loan should be satisfied. The deed contained a proviso for its avoidance, on payment on the 1st January, 1837, “ Provided also, and it is hereby further declared and agreed, that nothing herein contained shall extend to charge or incumber, or to hinder or prevent the said Company or their successors in or from selling all or any part of the lands, tenements or hereditaments, which have been or may be purchased by the said Company, and which by the said last recited act the said Company are authorized to sell.”

The cause was tried before *Rolfe B.* at the Liverpool Summer Assizes, 1840, when the plaintiff had a verdict, subject to a motion for entering a nonsuit, if the Court should be of opinion that the land of the Company had not passed by the mortgage.

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Cresswell, in the Michaelmas term following, having obtained a rule accordingly,

Pashley now shewed cause. The ejectment was maintainable, for the Company had power to mortgage their lands, and did in fact mortgage them to the plaintiff.

The Company had such power, for by sect 75 of 11 *Geo.* 4, they are authorised to assign the "property" of the undertaking, as well as the "rates and tolls." "Property," therefore, must mean something not included in "rates and tolls," and it has frequently been held to pass land, as in *Doe d. Wall v. Langlands (a)*. [Lord Denman C. J. It will not be contended that "property" may not mean real property, the question is whether that can be the meaning with reference to the statutes regulating this Company.] A subsequent act (the 4 *Will.* 4, c. cxi. s. 2, local, personal and public), which enables the Company to borrow 40,000*l.* more, uses the same words as the 11 *Geo.* 4. The Company "may assign the property of the undertaking, and the rates and tolls," and this act is recited in a still later act of the Company (1 *Vict.* c. xxi. local, personal and public), to have authorised loans "to be secured by mortgages of the *said railway and works.*" The word "property" therefore, in the case of this Company, has been declared by the legislature to mean land.

Assuming, therefore, that the legislature intended to include land by the words "property of the undertaking," the form of mortgage given, which has been followed in this case, must be sufficient to pass land. In the form of transfer given by the act the word "property" is used to represent the word "undertaking" employed in the original mortgage deed. Every word of the deed must have effect given to it, and, unless land is construed to pass, the word "undertaking" in this deed will have no meaning given it. The words of a grant are always to be taken most strongly against the grantor, and this applies most

(a) 14 East, 370.

especially to a deed poll (a), which is to be construed like a guarantie, where the words are "to be taken as strongly against the party giving the guarantie as the sense of them will admit:" *Mason v. Pritchard* (b). Other creditors of the Company will not be prejudiced by allowing the plaintiff to enter on the railway. He will be entitled to appropriate no more than is sufficient to satisfy his own debt or a due proportion of it, and, as to the residue of the receipts, he will be "a mortgagee, in the situation of bailiff or trustee for all the other creditors:" *Doe d. Banks v. Booth* (c), *Doe d. Thompson v. Lediard* (d). In *Pontet v. The Basingstoke Canal Company* (e), where the Company were empowered to borrow money "upon the credit of the said undertaking, and the rates or duties granted and made payable by the said act, and by writing under their common seal to mortgage or assign over the said undertaking, and the said rates or duties as a security for the money so to be borrowed, together with interest for the same," and the Company had by deed poll mortgaged "the navigation and undertaking and the rates," as security for a sum of money borrowed, with interest, it was held that the Company could not be sued in covenant on the deed, *Tindal C. J.* saying, "the terms of this contract are satisfied by giving the lenders of money a security on the undertaking without allowing them to sue the corporation. Their remedy would be by entering on the property of the Company." That case is exactly in point. It is true that, if the mortgagee enters, he may have no power to work the railway, but that is immaterial. [*Coleridge J.* It may, however, be a guide to us in construing the act. The 11 *Geo.* 4, c. lxi. s. 115, empowers the Company to take tolls. The same power does not appear to be given to their assignees. How then, if the Company are put out of possession, can the tolls be levied?]

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(a) Plowd. 134,

(b) 12 East, 227.

(c) 2 B. & P. 223.

(d) 4 B. & Ad. 137; S. C. 1 N. & M. 683.

(e) 3 Bing. N. C. 433; S. C. 4 Scott, 182.

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It must be implied that the assignees are to have the same power. The cases cited of *Pontet v. The Basingstoke Canal Company* (a) and *Doe d. Banks v. Booth* (b) shew that the mortgagee has no remedy at law except by mandamus, unless he can maintain ejectment.

LORD DENMAN C. J.—I do not see any thing in this act which requires us to put so inconvenient a construction upon it as to say that the Company may be turned out of possession. Cases under turnpike acts, as to the mortgage of toll gates as well as tolls, do not apply. What the word “undertaking” means here I do not very well know, and it is impossible therefore for me to decide this case with satisfaction. The observation of *Tindal C. J.* in *Pontet v. The Basingstoke Canal Company* (a) certainly appears favourable to the plaintiff, but it was not necessary to the decision in that case; and, perhaps, if a farther consideration of the point had been necessary, it might have been thought doubtful by that learned judge, whether the creditor had the right of entering upon the property of the Company.

WILLIAMS J.—The 59th section, enabling the Company to dispose of land not wanted for the purposes of the act, does not bear upon this question. I think it impossible to say the 75th section embraces land, and there are no rules of construction which require us to add words.

COLERIDGE J.—This is purely a question of construction. If the word “undertaking,” which is ambiguous, is to mean the whole speculation, including the land, buildings, as well as the rates, then the clause which authorises the Company to assign the undertaking will authorise the assignee to put an end to the undertaking; for if he takes possession he has no power given him to take the tolls. The act must have contemplated such a power as could be exercised consistently with the carrying on of the un-

(a) 3 Bing. N. C. 433; S. C. 4 Scott, 182. (b) 2 B. & P. 224.

dertaking as usual. I see that by sect. 77 of the 11 *Geo.* 4, no mortgagee is to "be deemed a proprietor of any share, or shall be capable of acting or voting as such at any meeting of the said Company for or on account of his or her having advanced any money on such mortgage or assignment." That seems to favour the construction that the security of the creditor is not to be of such a nature as will enable him to take possession.

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WIGHTMAN J. concurred.

D.

Rule absolute.

BAYNES v. BREWSTER.

Saturday,  
Nov. 27th.

**TRESPASS** for assaulting and striking, &c. the plaintiff, and imprisoning and compelling him to go in custody along divers streets to a certain messuage, and there imprisoning and detaining him, and then compelling him to go thence along divers other streets &c. to a certain other messuage, and there imprisoning and detaining him &c. &c.

In an action for false imprisonment the plea stated that the plaintiff committed a breach of the peace by violently knocking for a long time at the door of defendant's dwelling-house, and that the plaintiff threatened to continue such knocking until a certain book was delivered up to him; that the defendant then sent for a constable, and the plaintiff, having ascertained

Plea: the said defendant says, that before and at the said time when &c., in the said declaration mentioned, the said defendant was lawfully possessed of a certain tenement, dwelling-house and premises, with the appurtenances, situate and being in the said county of Essex, and in which he the said defendant and his family then resided, and, the said defendant being so thereof possessed, the said plaintiff just before the said time when &c. (to wit) on the day and year aforesaid, without the leave or licence of the said defendant, and at an unseasonable hour (to wit), at nine of the clock at night, entered and came into the said dwelling-

this, ceased knocking and ran off, when the defendant, with the assistance of the constable, immediately pursued the plaintiff and overtook him near the dwelling-house, whereupon the defendant, in order to preserve the peace and prevent the plaintiff from continuing the disturbance, gave him in charge to the constable, &c. &c.

*Held*, that the plea was bad, non obst. vered., as it did not shew either that the breach of the peace was continuing, or shew any certain facts from which a renewal of the breach was to be apprehended.

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house, and then with force and arms made a great noise and disturbance therein, and then insulted and abused the said defendant in his said dwelling-house, and greatly disturbed and disquieted him and his family in the peaceable possession of the same, in breach of the peace of our said lady the queen, whereupon the said defendant then and there requested the said plaintiff to cease his said noise and disturbance and to depart from and out of the said dwelling-house, which he the plaintiff reluctantly did, and thereupon the said plaintiff then threatened the said defendant that he the said plaintiff would stand up and rap at the back door of the said dwelling-house until the said defendant delivered up to him the said plaintiff a certain book then in the possession of the said defendant. And the said defendant further says, that just before the said time when &c., in the said declaration mentioned, the said plaintiff having departed from and out of the said dwelling-house, stood at the back door thereof and upon the premises of the said defendant for a long space of time (to wit), for the space of two hours then next following, and during the said last-mentioned period he the said plaintiff continued to knock and rap most violently, illegally and wrongfully against the said back door of the said dwelling-house, and also during the last-mentioned period insulted and abused the said defendant and his family and servants then being in and about the said dwelling-house and premises, and thereby further disturbed and disquieted them in the peaceable possession of the said dwelling-house and premises in further breach of the peace of our said lady the queen; whereupon the said defendant then and there requested the said plaintiff to cease his said noise and disturbance, and to depart from and off his said premises, which he the said plaintiff then and there wholly neglected and refused to do, and then continued at the back door of the said dwelling-house knocking and rapping thereon as aforesaid, and then threatened the said defendant to continue making the said noise and disturbance until he the said defendant delivered to the said plaintiff the said book

then being in the possession of the said defendant as aforesaid. And the said defendant, in fact, further says, that the said plaintiff having continued to make the said noise and disturbance for the said space of time as hereinbefore mentioned he the said defendant then sent to one *James Chatters*, then being a constable of the parish of Little Maplestead in the said county of Essex, for the purpose of arresting and taking the said plaintiff into custody, and of thereby preventing him further disturbing and annoying the said defendant and his family as aforesaid. And the said plaintiff, having ascertained that he was about to be given into custody by the said defendant, ceased the said knocking and rapping at the back door of the said dwelling-house, but which he had violently, wrongfully and illegally continued up to that period, and then and there ran and escaped off and from the said premises of the said defendant, when he the said defendant, accompanied by certain persons who had been called to the aid and assistance of the said *James Chatters*, so being such constable as aforesaid, immediately followed and pursued the said plaintiff, and overtook him in a certain close near to the said dwelling-house of the said defendant; whereupon the said defendant, in order to preserve the peace, and to prevent the said plaintiff from continuing to disturb the good order and tranquillity of the said dwelling-house of the said defendant, and to hinder and prevent the said plaintiff from continuing to make the said noise and disturbance at the said dwelling-house of the said defendant during the whole night, then gave charge of the said plaintiff to the said *James Chatters*, then and there being such constable as aforesaid, and then requested the said *James Chatters*, so being such constable as aforesaid, to take the said plaintiff into his custody, and carry him before some justice or justices of our said lady the queen assigned to keep the peace in and for the said county of Essex, to answer the premises and to be dealt with according to law. And the said *James Chatters*, so being such constable as aforesaid, at such request of the

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said defendant, then gently laid his hands on the said plaintiff for the cause aforesaid, and did then take the said plaintiff into his custody, in order to carry and conduct the said plaintiff before such justice as aforesaid, to be there dealt with according to law for his said offence and breach of the peace; and, because it was then late at night and an unseasonable time for the said *James Chatters* to carry the said plaintiff before such justice as aforesaid, he the said *James Chatters*, so being such constable as aforesaid, for that reason and for the cause aforesaid, necessarily and unavoidably detained and imprisoned the said plaintiff until the next morning in the said message in the said declaration mentioned. And the said defendant further says, that on the next morning, as soon as conveniently could be, he the said *James Chatters*, so being such constable as aforesaid, did carry and convey the said plaintiff before such justice as aforesaid, to answer the said premises and to be dealt with according to law, and on the occasion aforesaid the said plaintiff was necessarily and unavoidably trespassed upon and assaulted, seized and laid hold of, pulled and dragged about, and given and struck the said blows and strokes, and forced and compelled to go about, and be imprisoned and kept and detained in prison, as in the said declaration mentioned, as he lawfully might have been for the cause aforesaid, the defendant on those occasions doing no unnecessary trespass or damage to the plaintiff, and which are the said several trespasses in the said declaration mentioned. And this the defendant is ready to verify, &c.

The action was tried before *Gurney* B. at the Chelmsford summer assizes 1840, when a verdict was found for the defendant.

A rule nisi having been obtained to enter judgment for the plaintiff non obstante veredicto, on the ground of the insufficiency of the plea,

*Gurney* and *Ogle* now shewed cause. This rule has been obtained on the ground that the plaintiff had not com-

mitted any breach of the peace within view of the constable, and therefore that the defendant had no right to give the plaintiff in custody. But the plea shews either that the breach of the peace was continuing, or, at all events, that there was danger of its renewal, and it is found that the defendant gave the charge in order to prevent the renewal of the breach of the peace. *Rex v. Howarth* (a) shews that a person who has attempted to commit a felony may be taken on fresh pursuit, though the attempt has been entirely abandoned. *Timothy v. Simpson* (b) is a direct authority that a person may be apprehended for the purpose of preventing the renewal of an affray, and in that case it is treated as questionable whether even "after the affray has entirely ceased, after the offenders have quitted the place where it was committed, and there is no danger of its renewal," the offender may not be given in charge to a constable who has not seen the affray committed. It is also there added, "it is clear that any person present may arrest the affrayer at the moment of the affray, and detain him till his passion has cooled, and his desire to break the peace has ceased, and then deliver him to a peace officer. And, if that be so, what reason can there be why he may not arrest an affrayer after the actual violence is over, but whilst he shews a disposition to renew it by obstinately remaining on the spot where he has committed it. Both cases fall within the same principle, which is that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his conduct shews that the public peace is likely to be endangered by his acts." *Ingle v. Bell* (c) is an authority to the same point. It is true that in both these cases the offender was taken on the spot where the breach of the peace was committed. But the place where the party is taken is material so far only as it is one of the

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(a) Moody's C. C. 207.

(c) 1 M. &amp; W. 516.

(b) 1 C., M. &amp; R. 757.

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ingredients constituting the probability that the breach will be renewed. Here the plaintiff was taken near the spot, and all the circumstances shew that he contemplated a renewal of the breach. It appears from *Sharrock v. Hannemer* (a), which is commented on in *Reg. v. Wyatt* (b), that a petty constable may arrest a party who has committed a breach of the peace out of his sight, though a high constable cannot. See also 1 *Hale's P. C.* 587 and 2 ib. 90, *Dalton's Country Justice* (Affray), 33, and *Williams v. Dawson*, referred to in *Hobbs v. Branscomb* (c). After verdict it must be taken that the plaintiff was apprehended whilst there was danger of his continuing the breach of the peace.

They also argued that the constable appeared from the plea to have jurisdiction to act in the district where the plaintiff was taken, but this point became immaterial.

*Thesiger* contra was not heard.

Lord DENMAN C. J.—I must express my regret that pleas are getting into vogue, in which numerous facts are stated by way of evidence, upon which a judge seems expected to perform the office of the jury. The general propositions necessary to the case of a party should be stated in plain terms, and not left to inference from particular circumstances.

In deciding upon this plea, I will pass by the question whether the constable could act in the particular district, and will confine myself to the question, whether the plea discloses such circumstances as rendered the interference of the defendant justifiable. The plea states that the plaintiff had conducted himself in a very violent and improper manner, and it cannot be doubted that any constable or private individual might have interfered while the plaintiff was so conducting himself. But it seems that the plaintiff

(a) Cro. Eliz. 375.

(c) 3 Campb. 420.

(b) 2 Ld. Ray. 1195.

had already discontinued his annoyance, and had gone away from the premises at the time he was taken in custody. It is stated indeed that he was immediately pursued and overtaken *near* to the premises of the defendant, but how near the premises? I have no means of forming any opinion, and cannot tell what a jury might find as to the distance. The plea then gives us this further information, "whereupon the defendant, in order to preserve the peace, and to prevent the plaintiff from continuing to disturb the tranquillity of the defendant's dwelling house" &c., gave the plaintiff into custody,—that is after the plaintiff had gone away the defendant gave him in custody to prevent his returning and renewing the outrage. Are we to infer, merely because the question arises after verdict, that the plaintiff's imprisonment was necessary to prevent the repetition of the annoyance? I think this would be a most overstrained inference, when the plea does not allege that there was any danger or threat of such repetition after the plaintiff had gone away, but merely that the motive passing in the defendant's mind, was to prevent the repetition, which is by no means an equivalent averment. *Rex v. Howurth* (a) does not apply; my brother *Littledale*, with his usual caution, reserved for the judges a question, "whether the prisoner under the circumstances of the case might be apprehended for the misdemeanour without a warrant." The misdemeanour was an attempt to commit a felony, and the judges thought under the circumstances, as a *matter of evidence*, that "as the prisoner was seen in the outhouse, and was taken in fresh pursuit before he left the neighbourhood, it was the same as if he had been taken in the outhouse, or in running away from it, and that it was all one transaction." The judges had all the circumstances as to time and other matters before them, and thought the evidence sufficient. But we cannot, in considering this record, tell whether half an hour, or what other interval elapsed between the time of

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(a) *Moody's C. C.* 207.



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the plaintiff going away, and the time of his apprehension : that and many other circumstances could only be ascertained by the jury. The plea is bad ; there is nothing to shew, with any preciseness, on what the probability of the plaintiff renewing his breach of the peace was founded.

WILLIAMS J.—It is unnecessary to decide how far a constable may interfere after an affray is over. In practice, I believe, it is generally assumed that, when an affray is over, the affrayer cannot be apprehended without a warrant, unless there remain such symptoms that a strong probability arises of the affray breaking out afresh. The facts however in this plea fall short of such a case. It is stated that the knocking at the defendant's door had been discontinued, and that the plaintiff had run away, when the defendant accompanied by the constable and others immediately followed, and overtook him near the defendant's dwelling house. How near to the dwelling house the plaintiff was apprehended, or how soon after he had ceased knocking, we cannot say. Unless therefore we are prepared to hold that a party who has committed a breach, no matter how long since, or how far off, may be apprehended without a warrant, if the motive of the party so apprehending him is *bonâ fide* to prevent a recurrence of the breach, we must hold that this plea falls short of a justification.

COLERIDGE J.—I am of the same opinion. My judgment proceeds on the assumption that the constable had jurisdiction in the district, on which point it is not necessary to pronounce any opinion. It appears from the plea that the plaintiff committed a breach of the peace, which he threatened to continue until a certain book was delivered up to him, and did continue until a constable was sent for, upon which he left the premises. But it is not stated that, after he had so left, he repeated his threat, or did anything to manifest his intention of renewing the breach of the peace. It is stated indeed that he was given into custody to prevent

his continuing such breach, but no fact is stated from which the danger of his continuing it is to be collected.

The question therefore, comes to this,—whether a party can be apprehended without a warrant, because he *has* committed a breach of the peace. It is said that after verdict we must intend all that is deficient in the defendant's case. But the verdict will not help, for the facts necessary to the defendant's case are not alleged in his plea, and need not therefore have been proved by him.

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WIGHTMAN J.—It is not necessary to give an opinion on the preliminary point as to the local jurisdiction of the constable. The authorities as to the right of apprehending an affrayer after the affray is over, and which appear to conflict with each other, are collected in *Timothy v. Simpson (a)*. But it is there laid down as clear “that, for the sake of the preservation of the peace, any individual who sees it broken may restrain the liberty of him whom he sees breaking it, so long as his *conduct* shews that the public peace is likely to be *endangered* by his acts.” Does this plea shew anything of the sort? I rather infer from it that, although the plaintiff had previously threatened to continue the disturbance, he ran off as soon as the constable was sent for, and made no further demonstration of his purpose.

Rule absolute.

D.

(a) 1 C. M. & R. 757.

MORRIS v. MATTHEWS and another.

Tuesday,  
 Nov. 16th.

DEBT by the assignee of the sheriff of Middlesex against the sureties in a replevin bond. The declaration stated the condition of the bond to be, “that if the said *R. Brown* (the tenant) did appear at the *then* next County Court for the “then and there to prosecute the suit with effect,” that the plaintiff has been removed by re. fa. lo. and that after the removal the suit abated by the death of the plaintiff in replevin.

It is no breach of a replevin bond conditioned to appear at the next County Court and

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said county of Middlesex, to be holden at the house known by the name of the Sheriff's Office, in Red Lion Square, in the said county, and should *then and there prosecute his said action with effect* against the now plaintiff, for &c.," the said obligation was to be void. The declaration then, after stating the deliverance by the sheriff of the things distrained, alleged that the tenant did appear at the next County Court, "without the writ of our Lady the Queen," and levied his plaint against the now plaintiff for the taking, and found pledges as well for prosecuting his said plaint, as for returning the said goods and chattels, which said plaint afterwards, to wit, on the 25th day of July, 1840, "was duly removed, at the instance of the said *R. Brown*, from and out of the County Court of the said sheriff of Middlesex, into the court of our said Lady the Queen, before her Majesty's justices at Westminster, by virtue of her said Majesty's writ of recordari facias loquelam, before then duly sued out and prosecuted out of the said court of our said Lady the Queen of her chancery at Westminster aforesaid, returnable before her Majesty's justices at Westminster, on the 2d day of November, in the year last aforesaid; yet the said *R. Brown* did not appear in the said court of our said Lady the Queen at the return of the said writ, and did not then and there, or at any time or place, prosecute the said action with effect against the now plaintiff for the taking and alleged unjustly detaining the said goods and chattels, according to the form and effect of the said condition of the said writing obligatory, although a reasonable time in that behalf hath long since elapsed, but therein wholly failed and made default, whereby the said writing obligatory became forfeited."

The defendants pleaded that, after the said plaint in the said declaration mentioned to have been levied by the said *R. Brown*, against the now plaintiff, had been so duly removed, at the instance of the said *R. Brown*, from and out of the said County Court of the said sheriff of Middlesex, into the Court of Common Pleas, by virtue of the said writ

of re. fa. lo., and before the day on which the said writ was returnable, to wit, on &c., the said *R. Brown* died, by means whereof the said suit abated.

The plaintiff replied, that he the said *R. Brown* in his lifetime, and whilst the said plaintiff was prosecuting in the said County Court, to wit, on the 25th July, 1840, sued out the said writ of re. fa. lo. and delivered it, and thereby removed the plaint, "and thereby then greatly delayed the said plaint and suit, and prevented the said plaint and suit proceeding in the said County Court."

General demurrer.

*Baldwin*, in support of the demurrer. The removal of this plaint by the writ of recordari facias loquelam was not a breach of the replevin bond. *Seal v. Phillips* (a), *Harrison v. Wardle* (b), *Perreau v. Bevan* (c), *Arford v. Perrett* (d), shew that it is no breach unless there be delay after the removal. This plea was framed on the authority of the case of *The Duke of Ormond v. Bierley* (e), which is an express authority that when the suit abates by the death of the tenant there is no breach of the replevin bond. That case is accordant with the maxim, *actus Dei nemini facit injuriam*.

*Humfrey* contra. In the case of *The Duke of Ormond v. Bierley* (e), the suit was proceeding in the County Court when the plaintiff died, that case is therefore distinguishable from the present case. According to the course of practice in the County Court, the defendant could have obtained judgment before the death of the tenant, and, if that circumstance prevents the plaintiff from prosecuting with effect, in consequence of the delay caused by the removal, there is a breach of the replevin bond. The plaintiff removes at his peril; if, in consequence of any act occurring after the

(a) 3 Price, 17.

(b) 5 B. & Ad. 146.

(c) 5 B. & C. 301; S. C. 8 D. & R. 72.

(d) 4 Bing. 586; S. C. 1 M. &

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(e) Carth. 519.

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removal, the defendant does not get that effectual termination of the suit which he would have had if it had remained in the court below, there is a breach of the bond.

*Baldwin* in reply. Even delay in prosecuting the replevin is no breach of a bond conditioned to prosecute "with effect:" *Brackenbury v. Pell* (a), *Axford v. Perrett* (b), *Jackson v. Hanson* (c). If delay in prosecuting the suit would have been no breach of this condition, it cannot become so on the abatement of the suit by death. The Court of Exchequer in a recent case were of opinion that the words "then and there" were improperly introduced.

Lord DENMAN C. J.—The introduction in this case of the words "then and there" has created some difficulty. The Court of Exchequer in *Jackson v. Hanson* (c) thought these words ought not to be introduced, but they also held that the meaning of them is, that "he (the tenant) shall appear at the next County Court and then and there prosecute his suit, that is, begin to prosecute it, and afterwards prosecute it with effect." He had a clear right to remove the suit into this Court, so that any questions that might arise should receive a more solemn decision than they could in the Court below. Then if the removal is no breach of the condition, how can the abatement of the suit by the act of God make it one?

WILLIAMS J. concurred.

COLERIDGE J.—Mr. *Humfrey* is driven to contend that the removal of the plaint is a breach if the party dies. It is a strange argument, that what was no breach originally should be made so by the act of God.

WIGHTMAN J.—The plaintiff says there is not a breach by the removal, but by something which occurs afterwards.

(a) 12 East, 585.

(c) 8 M. & W. 477.

(b) 4 Bing. 586; S. C. 1 M. & P. 470.

The declaration complains that the defendant did not prosecute the suit with effect in the Court above; the replication, that he did not in the Court below.

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Judgment for the defendants.

The QUEEN v. The Inhabitants of WISTOW (a).

ON appeal to the July Quarter Sessions for the borough of Kingston upon Hull, against an order for the removal of a pauper from the parish of the Holy Trinity in Kingston upon Hull, to the parish of Wistow in the West Riding of York, the sessions confirmed the order subject to a case.

The case, after stating the point submitted to the opinion of this Court upon a question whether the grounds of appeal against the order had been served in time, concluded, "if the Court shall be of opinion that the said service of the statement of the grounds of appeal was bad and insufficient, then the aforesaid order shall stand confirmed; but if the Court shall be of a contrary opinion, then the appeal to stand respited until the General Quarter Sessions to be held for the said borough of Kingston upon Hull next after the judgment of the Court."

*Archbold* appeared to support the order of sessions, and,

*Raines* contrà, but

Lord DENMAN C. J. said that this Court could not hear a case so stated; that the sessions asked this Court to decide the case, and appeared also to reserve to themselves the right of coming to a decision of their own upon it afterwards.

PATTESON and WILLIAMS Js. concurred.

Rule for quashing the order discharged.

D.

(a) Decided at the sittings after Easter Term last, (May 10.)

This Court refused to hear a case sent up by the Quarter Sessions which concluded thus—"if the Court of Queen's Bench shall be of opinion, &c., then the order to be confirmed, but, if the Court shall be of a contrary opinion, then the appeal to stand respited until the next sessions after the judgment of the Court," because the sessions had at the same time asked this Court to decide the case, and had reserved the power of afterwards deciding it themselves.

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Plea, to an indebitatus count in debt for goods sold and delivered, that plaintiff sold them through *M.*, who at the time of sale was the agent of plaintiff, and intrusted by him with the goods; that *M.*, with the plaintiff's consent, sold the goods as his own, and defendant did not know plaintiff to be the owner, and was willing to allow to plaintiff, by way of set off, the amount of a debt due from *M.* to defendant at the time of such sale. Replication de injuriâ.

*Held*, in the Queen's Bench, on special demurrer to the replication, that the plea and replication were both good.

Judgment as to the replication reversed in the Exchequer Chamber, because the plea was not in excuse, and also because it set up authority from the plaintiff, and therefore could not be met by de injuriâ.

**DEBT.** The declaration stated that on the 1st January, 1840, the defendant was indebted to the plaintiff in 100*l.*, for goods sold and delivered, and also on the account stated.

Plea, that as to the first count of the declaration, so far as the same relates to the sum of 23*l.* parcel of the sum of money therein mentioned, the plaintiff ought not to maintain his aforesaid action thereof against him, because he says, that the plaintiff sold and delivered the said goods in that count mentioned, so far as the same relate to the said 23*l.* parcel &c. as aforesaid, to the defendant by and through the medium of one *George Mason*, who, at the time of such sale and delivery, was the factor and agent of plaintiff in that behalf, and intrusted by him with the said last mentioned goods; and the said *G. M.*, so being such factor or agent and intrusted as aforesaid, with the consent of the plaintiff, sold said last mentioned goods to the defendant in his the said *G. M.*'s own name, as the true and sole owner of the said last mentioned goods, and as and for his the said *G. M.*'s own proper goods, and the said *G. M.* then appeared to be such true and sole owner by the plaintiff's consent, and the plaintiff did not appear, nor was he known by the defendant, at or before the time of said sale, as the proprietor of, or to be interested in said last mentioned goods; and the defendant then bought and received said last mentioned goods of and from the said *G. M.* as his the said *G. M.*'s proper goods, and did not know, and had not the means of knowing, that the plaintiff was the owner of said last mentioned goods, or interested therein, or that the said *G. M.* was only an agent in that behalf. And the defendant further says the said *G. M.*, before and at time of said sale, was and from thence continually hitherto hath been and still is indebted to the defendant in a large sum of money,

to wit, the sum of 30*l.*, for the price and value of certain goods and chattels, and of divers horses, mares and geldings, and divers pigs and swine, before then sold and delivered by the defendant to said *G. M.* at his request, and for money found to be due from said *G. M.* to the defendant on an account before that time stated between them; which said sum of money so due to the defendant exceeds the said debt or sum of 23*l.* parcel &c. as aforesaid, and all damages by the plaintiff sustained by reason of the detention thereof, and out of which said sum of money so due to the defendant, he the defendant is ready and willing, and hereby offers to set off and allow to the plaintiff, the full amount of said sum of 23*l.* parcel &c., as aforesaid. Verification &c.

Replication: as to the said 23*l.* de injuriâ &c.

Special demurrer: for that such replication does not sufficiently traverse or confess and avoid the said first plea of the defendant, or the matter therein alleged, and is double and multifarious in this, to wit, that it attempts to put in issue the fact of the said goods therein mentioned having been sold by *G. M.* as the factor and agent of the plaintiff, and with the consent of the plaintiff, as his the said *G. M.*'s own goods, and also the fact of *G. M.* having been indebted to defendant as in the plea alleged; and also for that the said replication is inapplicable and insufficient as to the first plea of the defendant: for that such plea does not consist of matter of excuse, so as to enable the plaintiff to adopt such general form of replication; and in the same plea authority is alleged to have been expressly and directly derived from the plaintiff, (that is to say,) it is therein alleged that the said goods were sold by the said *G. M.* with the consent of the plaintiff, and such consent and authority of the plaintiff could not be properly traversed or put in issue, together with the fact of *G. M.* being indebted to the defendant, by the said replication of said plaintiff in the form in which the same is pleaded; and also for that the defendant by his said first plea claims a title and interest in said sum of 23*l.* therein mentioned, and to hold and

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retain same upon the grounds mentioned in the first plea; and also for that said first plea, and the matters therein alleged, are pleaded by way of discharge of said debt or sum of 23*l.* therein mentioned: and for the causes and reasons last aforesaid, the replication is also inapplicable and insufficient in law, and the same is in other respects uncertain, informal, and insufficient.

Joinder in demurrer.

The points stated by the defendant for argument were,  
 1. That the replication de injuriâ is altogether inapplicable in an action for debt, where the declaration contains only the indebitatus counts, and that in this case it neither traverses nor confesses and avoids the plea. 2. That the plea relies upon an authority derived from the plaintiff. 3. That the plea consists of matter in extinguishment and discharge of the cause of action at the time of the plea being pleaded. 4. That the plea does not consist of mere matter of excuse. 5. That the defendant claims title and interest, and a right to retain that part of the debt to which the plea relates. 6. That the replication is double in the respect stated by the demurrer.

The defendant will also contend that his plea is good, and that all defects of form, if any, are cured by the plaintiff having replied.

The points stated by the plaintiff for argument were,—  
 That the plea is inconsistent and contradictory, inasmuch as it states that the plaintiff sold the goods mentioned in the declaration to the defendant by and through the medium of one *George Mason* as his factor and agent, and then proceeds to allege, that *G. M.* sold the goods to the defendant with the consent of the plaintiff in his (*G. M.*'s) own name as the true and sole owner thereof; and further that the plaintiff was not known by the defendant as the proprietor of the goods, and that the defendant bought and received the goods of *G. M.* as his proper goods; and also for that the plea is unnecessarily prolix, and amounts to the general issue that the defendant was never indebted to

the plaintiff in manner and form as in the declaration is alleged.

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*Martin* in support of the demurrer (a). The plea is framed according to the form which was held good in *Carr v. Hinchcliff* (b).

With regard to the replication, it may be collected from *Selby v. Bardons* (c) that the replication de injuriâ, which puts in issue any indefinite number of facts, is an exception to the rules of pleading and is not to be extended. Not a trace of its application to actions of debt is to be found in any of the authorities. In *Hebden v. Ruel* (d) the point is noticed but not determined. This replication has lately been introduced in assumpsit, but, even in that form of action, appears to have been confined to cases on bills of exchange, where the plea that there is no consideration is an answer by way of excuse for not satisfying a claim which primâ facie imports consideration. *Isaac v. Farrar* (e) is a case of this kind.

But the replication cannot be admitted in this case, even consistently with the same rules on which it is admitted in assumpsit, for in the latter form of action it has been held, from *Crogate's* case (f) down to *Jones v. Senior* (g), that de injuriâ cannot be replied except to matter of excuse. Now the very nature of an indebitatus count is such that it cannot be met by a plea in excuse, for the count necessarily implies that there is a sum of money payable on request, and it cannot be that a sum of money should be payable on request and that at the same time there should be an excuse for not paying it. The plea in this case sets up a statutable discharge, and de injuriâ cannot be replied.

If the plea is bad, as alleged, as amounting to the ge-

(a) The case was argued in Michaelmas term, 1840, before Lord Denman C. J., Littlehale, Williams and Coleridge Js.

(b) 4 B. & C. 547; S. C. 7 D. & R. 42.

(c) 3 B. & Ad. 2.

(d) 6 Scott, 442.

(e) 1 M. & W. 65.

(f) 8 Rep. 66 b.

(g) 4 M. & W. 123.

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neral issue, then the replication is inadmissible; *Elwell v. Grand Junction Railway Company* (a); and the plea is now safe as it has not been specially demurred to.

*Heaton* contrâ contended that the plea was bad; and that the replication de injuriâ, which was the only mode of pleading to a series of facts constituting a single defence, was admissible on the principles recognised in *Noel v. Rich* (b) and the other cases in *assumpsit*.

*Martin* replied.

LORD DENMAN C. J.—The plea is clearly good. We will consider the question upon the replication.

*Cur. adv. vult.*

LORD DENMAN C. J. delivered the judgment of the Court.—The first question that arises on these pleadings is on the sufficiency of the plea to which the plaintiff has objected in the argument; and the grounds of the objection are set down in the margin of the paper book. (His lordship then stated the plaintiff's points for argument as set out above.) All objections to the form of the plea, and such as are the subject of special demurrer only, are cured by the plaintiff pleading over, but the general invalidity of the plea in matters of substance is not cured by the plaintiff pleading over. The general effect of the facts disclosed in this plea was considered and settled to constitute a good defence to an action like the present in the case of *George v. Clagett* (c) and *Rabone v. Williams* (d) in the notes, and other cases referred to in the case and the notes, and recognised in *Carr v. Hinchcliff* (e). In *George v. Clagett* (c), and the other cases, the defence arose on the general issue. After the case of *George v. Clagett* (c) the facts were sometimes pleaded specially, and sometimes also the general

(a) 5 M. & W. 669.

(b) 2 C., M. & R. 360.

(c) 7 T. R. 359.

(d) 7 T. R. 360, n. (a).

(e) 4 B. & C. 547; S. C. 7 D. & R. 42.

issue was pleaded. In *Carr v. Hinchcliff* <sup>(a)</sup> the facts were pleaded specially, and there was a demurrer to the plea, and one of the objections was, that it amounted to the general issue. But the Court held that, though the facts might be given in evidence under the general issue, yet inasmuch as it confessed and avoided the plaintiff's demand in the declaration, it might be pleaded specially. As to the other objections to the plea in this case, they do not amount to any real objection either in form or substance, and are not necessary to be noticed.

The plea therefore being good, the replication is to be considered. The cases as to replying *de injuriâ suâ propriâ* seem in former times to have arisen in actions of the various species of trespass, in replevin, in rescous, or in trespass on the case for defamation, or actions for different species of malicious prosecutions or other malicious proceedings. The replication does not seem to have occurred in actions of *assumpsit* and debt on simple contract, and indeed was not likely to have arisen, because under the respective pleas of non *assumpsit*, and *nil debet*, the defendant might in a very great number of cases go into the whole of his case, and of course the plaintiff's case in reply would proceed upon the issue joined upon such a plea, and, though in the old entries there are several special pleas in *assumpsit*, and debt on simple contract, yet the answers to them have been such as to bear out the plaintiff's case on taking issue on a single point, and we have not found any instance of this replication being made in actions of *assumpsit*, or debt on simple contract. But since the new rules a different system of pleading has taken place. In a very large number of cases in *assumpsit* and debt on simple contract a special plea becomes necessary. These rules make no provision for a plaintiff to reply several matters, and by the general principles of pleading he is not allowed to do so, nor can he take separate issues on the different facts in the plea. But at the same time, if the facts of the plea are such as that they form one

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entire defence, and ought all to be proved in support of the plea, the Courts, though they will not allow separate issues to be taken upon the different facts in the plea, may, if it be conducive to the justice of the case, and if the principles of pleading will allow it, permit a plaintiff to have a compendious form of replication in answer to the defendant's plea.

But then it is to be considered whether this can be done in actions on promises, and in debt upon simple contract, and upon that some doubts have been thrown out from time to time, but, upon the best consideration we can give it, we think that, if the law allows a plaintiff to say that the defendant of his own wrong and without the cause alleged in his plea committed the trespass (as in trespass), or took the goods or cattle (as in replevin), or spoke or published the words, or published the libel, (as in defamation), or committed the grievances (as in malicious prosecutions), or allows again to a defendant, where the pleadings go beyond a replication, to say, that the cattle, for instance, were in the close of the plaintiff of the wrong and injury of the plaintiff, and without the cause by him in his pleadings, as the case may be, in trespass, or replevin, alleged, so also it should seem that the principles of pleading may be extended to say that a defendant of his own wrong, and without the cause &c., broke the covenant, or broke the promise, or refused to pay the debt, or, if the form be liked better, broke the contract; or, if in debt, the language "of his own *wrong*" ought not to be introduced into actions of debt, these words might be altogether omitted, and it might be said that the defendant without the cause alleged refused to pay the debt &c.

But, if this compendious form of replication be allowed in these actions, it may be necessary to confine the plaintiff within some limits; and, in considering that, there are a number of exceptions to this general pleading, laid down in *Crogate's* case, 8th *Coke's* Rep. 66 b., and, though these rules may be thought not to have a direct application to actions on promises and debt, yet we think that, if, in

consequence of a new practice of pleading being introduced, a form of replication, not before in use in any particular form of action, should be adopted into it from some other, the most convenient course is also to adopt the rules and exceptions, which had applied to it in that form, as far as they are properly applicable to the class of actions in which they are so adopted. Before adverting to the decisions which have occurred since the new rules of pleading, we will again mention the case of *Carr v. Hinchcliff* (a). One of the objections to the plea was, that it imposed a hardship upon the plaintiff, as it compelled him to admit one half of the defendant's case; but, supposing it to be so, Mr. Justice Bayley says that would not make the plea bad, and he said he was not prepared to say that the plaintiff might not have framed his replication so as to put in issue both the sale by the factor as alleged in the plea, and the debt stated to be due from him to the defendant. These two facts, he says, are stated as one matter of defence, and the replication suggested might probably be supported by the cases of *Robinson v. Raley* (b) and *O'Brien v. Saxon* (c); but, he added, that upon this point it was unnecessary to decide, and he did not profess to give any decided opinion. *Robinson Raley* (b) cited was a plea of justification by a right of common, and the replication traversed that the cattle were the defendant's cattle, and that they were levant and couchant upon the premises, and were commonable cattle, to which there was a special demurrer, and the court held the replication good; for, though there were several points put in issue, they constituted one single proposition, which was the measure of the common. *O'Brien v. Saxon* (c), the other case, was an action for maliciously suing out a commission of bankrupt against the defendant, and he pleaded that the plaintiff was a trader, and that he contracted a debt to the amount of 100*l.*, and became a bankrupt

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(a) 4 B. & C. 547; S. C. 7 D. & R. 49. (c) 2 B. & C. 906; S. C. 4 D. & R. 579.

(b) 1 Burr. 316.

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within the statute &c. Replication, de injuriâ sua propriâ, and on demurrer the court held the replication good. They said these facts connected together contained but one entire proposition, and that the plea consisted of matter of excuse only. These two cases are instances of pleadings, such as were in use at the time when *Crogate's* case was decided. Several cases have occurred, since the new rules of pleading, of this kind, either as a direct replication, or where the general doctrine applicable to this branch of pleading has been incidentally adverted to. Vide *Hooker v. Nye* (a); *Solly v. Neish* (b); *Crisp v. Griffiths* (c); *Whittaker v. Mason* (d); *Griffin v. Yates* (e); *Isaac v. Farrar* (f); *Jones v. Senior* (g); *Watson v. Wilks* (h); *Hebden v. Ruel* (i); *Elwell v. Grand Junction Railway Company* (k). It is not necessary to advert to, and state the particulars of these cases: the facts in this description of pleas, as they are now in use, are so much varied, that the particulars of them will not furnish much room to argue from one to another. But the general conclusion to be drawn from them appears to be this: that the replication cannot be objected to as multifarious if the facts stated in the plea, though they are several, constitute one ground of defence, for the rule of pleading is, not that the issue must be joined on a single fact, but on a single point of defence. But this nevertheless is to be understood, that there is nothing in the plea such as title or interest &c., which falls within the exceptions as to this pleading; that this pleading by the plaintiff is to be allowed where the plea consists of mere matter of excuse for non-performance of the contract declared upon; that this pleading is not to be allowed when the plea contains a denial of the promise made to the plaintiff, because, if the plea denies

- (a) 1 C., M. & R. 258.  
(b) 2 C., M. & R. 355.  
(c) 2 C., M. & R. 159.  
(d) 2 Bing. N. C. 359; 2 Scott,  
567.  
(e) 4 Bing. N. C. 579; 2 Scott,  
845; 4 Dowl. P. C. 647.

- (f) 1 M. & W. 65.  
(g) 4 M. & W. 123; 6 Dowl.  
P. C. 601.  
(h) 5 A. & E. 237; S. C. 6 N.  
& M. 752.  
(i) 6 Scott, 442.  
(k) 5 M. & W. 669.

the promise, it would be a bad plea, and, if so, the replication would be bad, because it cannot be considered as part of the cause of the breach of promise to the plaintiff, that the promise was not made to the plaintiff; and that this pleading is not to be allowed, where the plea amounts to matters of discharge, and not of excuse.

These being, as we consider, the principles, or at least some of them, on which pleadings of this sort are to be decided, it now becomes proper to consider this particular replication. We have before noticed Mr. Justice *Bayley's* part approval of such a replication, by way of anticipation if it should arise, in *Carr v. Hinchcliff (a)*. We next notice the judgment of the Court of Exchequer, delivered by Lord *Abinger* in *Isaac v. Farrar (b)*, in which he recognises Mr. Justice *Bayley's* judgment in *Carr v. Hinchcliff (a)* with approbation. But, besides these authorities, as the question is distinctly brought before the Court upon a demurrer to the replication, it is proper to examine it by the rules which we have above stated are to govern this sort of pleading.

The replication is not multifarious, because the facts stated in the plea constitute one point of defence, and upon that the issue is taken. The plea does not deny the promise made to the plaintiff, but admits it, because all the details of the agency and factorage are nothing more than a statement of circumstances under which the sale was made by the plaintiff to the defendant. The plea does not amount to a discharge of the debt. Pleas in discharge, as contradistinguished from pleas in excuse, are where the matter of the plea bears upon and applies to the debt itself, and puts an end to it. Of this sort are, payment, accord and satisfaction, an award on the subject of the action, but which under some circumstances must be taken to be a dispensation, bond given for the simple contract debt, discharge of the contract before breach, performance of the contract, release, discharge under bankrupt acts, discharge under the insolvent debtors' acts. All these pleas go directly to the

(a) 4 B. & C. 547; S. C. 7 D. & R. 752.

(b) 1 M. & W. 65.



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debt, and, as soon as they shew that, the debt is gone; and, if a debtor does not choose to avail himself of them by pleading, it is his own fault, and he may in consequence have to pay the debt twice over. But this plea we conceive is altogether collateral, and in excuse; the having a set-off is no discharge of the debt, the debt continues as before. But the defendant says, in looking over his transactions with the plaintiff, he finds the plaintiff owes him more money than he owes to the plaintiff, and therefore he says, I do not choose to pay the plaintiff's debt; he is not bound to set it off, and he is in no worse condition by not setting it off. If he chooses to pay the plaintiff, he may then recover his own debt from the plaintiff, and there may often be very good reason for his preferring to bring forward his own claims as plaintiff rather than set them off; it is no bar till he pleads, when he makes his election what he will do, and, when he does make his election by pleading, though his plea is a bar to the action, it does not follow that the plea is in discharge. Whether the plea is a discharge or not, is only to be seen by the matter of the plea, for otherwise every plea in bar would be a plea in discharge, and the plea of set-off of itself, by the very form of it, by offering to set off, and allow &c., shews that it is not a plea in discharge. It is true that in *Carr v. Hinchcliff* (a) some of the judges speak of the plea being in discharge of the action, but the attention of the Court was not directed to the distinction between pleas in excuse and pleas in discharge, the question there was, whether the plea amounted to the general issue. We are therefore of opinion that this is a plea in excuse, and not in discharge.

There are two other objections, that the plea relies on an authority derived from the plaintiff, and also that the defendant claims title and interest, and a right to retain that part of the debt to which the plea relates. These points are taken from *Crogate's* case, but the facts stated in those pleas are totally inapplicable to these rules.

(a) 4 B. & C. 547; S. C. 7 D. & R. 42.

Upon the whole of this case, we are of opinion that the plea is good, and that the replication in answer is also good, and that there must be judgment for the plaintiff.

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D. Judgment for the plaintiff (a).

(a) See the case in the Exchequer Chamber (the next case).

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IN THE EXCHEQUER CHAMBER.

(ERROR FROM THE QUEEN'S BENCH.)

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SALTER v. PURCHELL.

**ERROR** was brought on the judgment in the preceding case. The case was argued in Trinity vacation, 1841 (June 15), before *Tindal C. J.*, *Maule J.*, and *Parke, Alderson, Gurney*, and *Rolfe, Bs.*

*Martin*, for the plaintiff in error. 1. The replication de injuriâ is not admissible in debt. As the new rules of pleading do not affect replications, the question is to be considered as at common law. This replication has always been treated as an exception to the ordinary principles of pleading, which require a party to take issue on a single fact, and was admitted to be so by the judges who supported the replication in *Selby v. Bardons* (b). It may be remarked, in passing, that, even consistently with *Robinson v. Raley* (c), and other cases which have determined that de injuriâ may be used to traverse several facts in a plea, this replication may be held bad, for the plea does not merely contain several facts constituting one proposition, but it contains several propositions, and it is no answer to say that they constitute only one defence. There is no authority whatever for allowing the replication in actions of debt. The language of the replication itself, "of his own wrong," &c. implies that it is to be confined to actions of tort; and

(b) 3 B. & Ad. 2.

(c) 1 Burr. 316.

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this point seems to have been generally assumed: *Crogate's* case (a); *Com. Dig. Pleader* (F. 18) to (F. 24); note 7 to *Craft v. Boite*, 1 *Wms. Saund.* 244 c, and note (1) to *White v. Stubbs*, ib.; *Jones v. Kitchin* (b). The replication was used in covenant in *Rickards v. Murdock* (c), but was not demurred to, so that its admissibility in such a form of action was not considered. The first case in which it was decided that this replication might be used in assumpsit was *Isaac v. Farrar* (d), which has been followed by *Griffin v. Yates* (e) and *Watson v. Wilks* (f). The two last cases appear not to have been fully considered. All three were cases on bills of exchange. The cases on this point are collected and remarked upon in a note to *Brancker v. Molyneur* (g). The judgment in *Isaac v. Farrar* (d) appears to have proceeded upon the consideration that assumpsit was one of the forms of trespass on the case.

2. De injuriâ cannot be admitted in the present case, even on the principles on which it has been admitted in assumpsit, for the plea is not in excuse. There can be no excuse offered in answer to an indebitatus count. That count is very peculiar: it passes over all the antecedent circumstances which give rise to the claim, and begins at the end. The existence of the subject-matter of the count and the cause of action are simultaneous. The debt is payable in præsenti, which cannot be if there is any excuse for its non-payment. If the circumstances which give rise to the debt were stated in a special count, and a breach alleged in the non-payment of money at a future time, an excuse for such non-payment might exist; but, when the count alleges a debt then existing and then payable, which the plaintiff is bound to shew, a plea in excuse for non-payment must amount to never indebted, and to such a plea

(a) 8 Rep. 66 b.

(b) 1 B. &amp; P. 76.

(c) 10 B. &amp; C. 527.

(d) 1 M. &amp; W. 65.

(e) 2 Bing. N. C. 579; S. C. 2 Scott, 845.

(f) 5 A. &amp; E. 237; S. C. 6 N. &amp; M. 752.

(g) 1 M. &amp; Gr. 720.

de injuriâ would be clearly bad: *Elwell v. Grand Junction Railway Company* (a). This very plea is objected to as amounting to the general issue. If that objection is well founded, it cannot now avail the plaintiff, as he has not made it the ground of special demurrer, and it is decisive in favour of the defendant, as it admits the plea to be such that de injuriâ cannot be replied to it. But according to *Carr v. Hinchliff* (b) the plea is good, and is a plea of set-off, founded upon the equity of the statute of set-off. Now it is immaterial whether the subject-matter of a set-off arise before or after commission of the breach declared upon. The set-off must exist at the time of pleading it; *Dendy v. Powell* (c); and it does not take any effect in relation to the plaintiff's demand until the defendant actually pleads it. This is evidently so; for, if the claim of the plaintiff carries interest, the interest would run on until the time of pleading the set-off. But the breach in an indebitatus count is the non-payment at the moment when the debt became payable, and is not continuous, or the plea of payment would be a traverse, which it is not: *Goodchild v. Pledge* (d). The breach in debt, indeed, is mere form: *Ashbee v. Pidduck* (e). The set-off therefore, which does not operate until pleaded, is matter subsequent to the breach, and can be no excuse for it. Whether a plea is one of set-off or amounts to the general issue, de injuriâ is an improper replication: *Cleworth v. Pickford* (f). The proper view of the plea seems to be that it sets up a statutable discharge, having in itself no connection with the contract declared upon, and de injuriâ is as inapplicable as to a plea of the statute of limitations. [*Peacock*. This plea is bad, for not stating that the defendant is willing to allow the set-off to *Mason*.] That objection, if good, is ground for special demurrer only.

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(a) 5 M. &amp; W. 669.

(d) 1 M. &amp; W. 363.

(b) 4 B. & C. 547; S. C. 7 D.  
& R. 42.

(e) 1 M. &amp; W. 564.

(c) 3 M. &amp; W. 442.

(f) 7 M. &amp; W. 314.

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Again, the plea sets up an authority given by the plaintiff, and for that reason also *de injuriâ* is inadmissible.

*Peacock* contra. The reason, why instances of *de injuriâ* are to be found in cases of tort only, is, because, previously to the new rules, matters which are now to be pleaded specially in cases of contract could formerly be proved under the general issue. But it was clear even before the decision in *Isaac v. Farrar* (a) that this replication was thought admissible in *assumpsit*: *Noel v. Rich* (b). As it is admissible in *assumpsit*, there is no reason why it should not be so in debt: non-payment is a wrong in the one case as much as in the other. The breach is no more material in *assumpsit* than in debt; and in *assumpsit* a plea of payment cannot conclude as a traverse of the breach. In *Hebden v. Ruel* (c) *Tindal* C. J. expressed an opinion that *de injuriâ* was admissible in debt.

2. This plea contains matter of excuse. It is not an ordinary plea of set-off, but excuses the non-payment to the plaintiff on the special ground that the plaintiff allowed a third person to appear as the owner of the goods sold to the defendant, in consequence of which the defendant, who admits the debt, claims to set off what is owing from *Mason* to himself. The plea is founded upon the law established in *George v. Clagett* (d), and differs very materially from the ordinary plea of set-off. This plea necessarily alleges that *Mason* was indebted to the defendant at the time of sale; and, if *Mason* had paid the defendant before this action was commenced, the answer in the plea could not have been set up. The defendant does not allege that the plaintiff's claim is extinguished, but says, "You have put me in such a position with my debtor *Mason*, by allowing him to appear as owner of the goods sold to me, that I have a right to put my claim on him against your claim

(a) 1 M. & W. 65.

(b) 2 C., M. & R. 360.

(c) 6 Scott, 442.

(d) 7 T. R. 359.

on me." The reasoning in *Carr v. Hinchcliff* (a), where the plea was held not to amount to the general issue, indicates that it was a plea in excuse.

The plea is substantially wrong in offering merely to allow the plaintiff the sum due from *Mason*; it should have offered to allow the sum to *Mason* also, for *Mason* ought to be discharged by the judgment in this case.

*Martin* in reply. The replication, that the defendant acted "of his own wrong without the cause alleged by him," must be confined to such pleas as do allege cause for doing the wrong. The cause for doing the wrong must of course have had existence at the time of doing the wrong; and therefore a plea in excuse, which sets up such cause, can never be founded on matter subsequent to the wrong. Suppose a release to be pleaded to trespass for a blow, the plaintiff could not reply *de injuriâ*, for it would involve the absurdity of replying, "You struck the blow without the cause you allege for doing so," when the plea alleges no cause whatsoever. It has already been shewn that this plea discloses no cause for the antecedent breach complained of in the declaration.

*Cur. adv. vult.*

TINDAL C. J. delivered the judgment of the Court (b).—The plaintiff below having declared in debt for goods sold and delivered, and upon an account stated, the defendant below pleads, as to 23*l.* parcel of the monies in the first count mentioned, that the plaintiff sold and delivered the goods to the defendant by and through the medium of one *G. Mason*, who was at that time the plaintiff's factor and agent in that behalf, and the said *G. Mason* being such factor and agent, with the consent of the plaintiff, sold them to the defendant in his own name and as his own goods, and that the defendant bought the said goods as the proper

(a) 4 B. & C. 547; S. C. 7 D. & R. 742.

(b) In Mich. Vacation, 1841 (Nov. 29).

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goods of the said *G. Mason*, and the plea then alleges that before and at the time of such sale and delivery, the said *G. Mason* was and still is indebted to the defendant in a larger sum of money, and offers to set off so much as is necessary to satisfy the said debt of 23*l.* and all damages for the detention thereof. To this plea the plaintiff below replied the general traverse, "*de injuriâ suâ propriâ absque tali causâ*," and, upon a special demurrer to that replication and joinder, the Court of Queen's Bench has given judgment in favour of the plaintiff below.

A writ of error having been brought by the defendant below on this judgment, two principal objections have been urged in argument before us, viz., first, that this general form of traverse of the plea is wholly inadmissible in an action of debt on the *indebitatus* counts; and secondly, that it is not applicable to the plea of the defendant, which is virtually and substantially a plea of set off. And, as we are all of opinion that the judgment of the Court below cannot be supported upon the second ground of objection, we hold it unnecessary to intimate any opinion on the first.

The question is whether the well known rule in *Crogate's* case (a) applies to the state of pleadings on this record. That rule, by which the plaintiff has been permitted to use this general form of replication, instead of being compelled to take issue on some material fact stated in the defendant's plea, has always been limited in its terms and in its application to cases of actions brought for personal injuries, where the facts stated in the plea amount merely to matter of excuse or justification of the act complained of. As where in trespass for assault and battery there is a plea of *son assault demesne*; or a plea of *molliter manus imposit*, in defence of possession; or, in false imprisonment, where there is a plea that the plaintiff broke the peace, and that he, the defendant, being a constable and present, took him, in order to carry him to a justice of the peace; or in an

(a) 8 Co. 66 b.

action on the case for defamation, where the plea justifies by reason of the truth of the words spoken; in all which, and similar, instances, the facts stated in the plea shew that at the time the act complained of was done it was done under circumstances which make it excusable or justifiable in the eye of the law, and it is to such pleas only that the rule in *Crogate's* case applies.

But there is a manifest distinction between such pleas and those which rely on matter of discharge and extinguishment of the right of action, as to which latter class no authority has been cited to shew that the general form of traverse is allowable, and indeed it is excluded by the very terms of the rule above referred to. Thus in a plea of payment, or accord and satisfaction, or release, or of any matter which extinguishes the right to sue, both the rules of pleading and the course and practice from the earliest time, require the plaintiff to make a traverse of or to deny the material fact, stated in the plea, which constitutes the discharge or extinguishment of the right of action.

In the present case, the plea is in substance a plea of set-off. Such a plea operates as a bar to the plaintiff's right of action, not by excusing or justifying the breach of promise complained of in the declaration, but, whilst it admits such breach to have been committed, by setting up, as a matter of compensation, the cross demand of the defendant, by force of the statute of *Geo. 2*. And it is unnecessary to observe that an ordinary plea of set-off cannot be met by the general traverse, but only by a special traverse or denial of the existence of the cross demand.

And, upon another and distinct ground, the replication upon this record is inapplicable to the present case. For in those instances, in which the plea goes only to matter of excuse or justification, and where consequently the general traverse is allowed, there is engrafted an exception, that, where the plea justifies under any authority, or command, or licence, from the plaintiff, the general replication is not good without a special traverse of such command, licence,

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or authority. And the exception to the rule, so far from being arbitrary, appears to be founded on good sense. For, although the plaintiff may be well allowed by his general replication to put in issue, and to compel the defendant to prove all the facts which constitute his defence, where they lie in his, the defendant's, exclusive knowledge, yet, where facts are pleaded which lie equally in the knowledge of the plaintiff and the defendant, such as an authority or licence given by the plaintiff, there is no reason for compelling the defendant to prove them, unless the plaintiff thinks proper to deny them by a special traverse, and the same reason will explain a similar exception from the general rule, where the defendant claims in his plea any interest in or out of land, for such interest must have been granted originally either by the plaintiff himself, or those to whom he is privy in estate.

Now, in the present case, the plea alleges that *Mason*, against whom the right of set off is claimed, was the factor and agent of the plaintiff, and that *Mason*, with the consent of the plaintiff, sold and delivered the goods in question to the defendant in his own name, and as his own goods. But the agency of *Mason*, and the consent of the plaintiff that he should sell the goods as his own, and in his own name, are facts that lie as much in the conusance of the plaintiff as the defendant, and stand upon the same footing as the authority or licence of the plaintiff, which form acknowledged exceptions from the general rule.

As well therefore upon this latter, as upon the former more general ground, we think the replication inadmissible in this case, and that the judgment of the Court below must be reversed.

Judgment reversed,

A point very similar has been determined by the Court of Exchequer in *Cleworth v. Pickford (a)*.

D.

(a) 7 Mee. & Wel. 314.

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## IN THE QUEEN'S BENCH.

The QUEEN v. The Inhabitants of NORTH BOVEY (a).

ON appeal to the Easter Quarter Sessions for the county of Devon, against an order for the removal of *James Langworthy*, his wife and children, from the parish of Northmolton to the parish of North Bovey, both in the said county, the sessions confirmed the order, subject to a case.

The case commenced by stating that the pauper had been bound a parish apprentice in North Bovey. No date was given to the apprenticeship. The case then proceeded thus :

That he (the pauper) afterwards agreed to serve *Edmund Stooke*, of the parish of Ashton in the said county, for a month, at 3s. a week. That when the month was up he agreed to live on at the same wages by the month. That the bargain was to be at an end at any time by a month's warning from either party. That he continued under that agreement nearly two years, and left his place by giving a month's notice ; and that he has not done any other act whereby to gain a settlement ; and that he is now chargeable to the said parish of Northmolton.

The ground of appeal was stated as follows :—"That the said *James Langworthy*, the pauper, acquired a settlement in the parish of Ashton, in the said county of Devon, by hiring and service with one *Edmund Stooke*, of George Teign, in the said parish, subsequently to that acquired by him in our parish."

On the trial of the appeal the respondents objected that the ground of appeal was insufficiently stated: Firstly, inasmuch as there was no sufficient statement of time at which the pauper was hired and served with *Edmund Stooke*. Secondly, inasmuch as it was not stated that the hiring and service was for a year.

Where the grounds of appeal against an order of removal set up a subsequent settlement out of the appellant parish, they must state all the essentials of such settlement.

If therefore the settlement is by hiring and service, it must be stated that the hiring was for a year.

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The counsel for the appellants, on the contrary, contended, that the ground of appeal, taken in connection with the written examination of the pauper, was sufficiently explicit to enable the respondents to meet the case on the merits, and that all was stated as to time which it was *bonâ fide* in the power of the appellants to ascertain; in support of which they tendered evidence to shew that inquiries as to that point had been made by them but without success. They also further contended, as to the statement of the hiring and service, that the sessions were not bound by any fixed general rule of construction, but, regard being had as well to the written examination of the pauper as to the grounds of appeal, were themselves the judges of the requisite particularity of the statement, according to the particular circumstances of each case, and that in this case the particularity was sufficient.

The Court did not deem it necessary to hear evidence on the first point, but on the whole objection gave the following judgment in writing:—"The Court, finding that the appellants have set forth all that was within their knowledge as to time *bonâ fide*, does not admit the first objection to the notice, but on the second objection they think that it is necessary that the appellant should have set forth the hiring and service to have been of the nature and description of a yearly hiring, and, that not having been done, the Court admits the second objection, and confirms the order, subject to the opinion of the Court of Queen's Bench as to the sufficiency of the notice of appeal on both the above points."

If the Court of Queen's Bench should be of opinion that the grounds of appeal were sufficiently stated, then the sessions are to be directed to enter continuances and hear the appeal; if the Court should be of a contrary opinion then the order of the sessions is to be confirmed.

*Greenwood* in support of the order of sessions. Either of the objections taken to the statement of the grounds of

appeal is fatal. First, the statement does not shew a hiring for a year; and, even if it is to be taken that the hiring mentioned is the same hiring that is also mentioned in the examination, the objection is not obviated, for the hiring in the examination is itself not described as a yearly hiring, and the payment of the wages by the month shews that it was not a yearly hiring. It is not enough that the grounds of appeal should refer generally to the head of settlement intended to be relied upon, but they should state all the essentials of the alleged settlement: *Reg. v. Middleton in Teesdale* (a), where the examination was held bad for omitting to state the renting to be for a year.

2. It has also been laid down that the statement should add time and place and all such other particulars as may enable the respondents to inquire into the truth of the settlement set up. These grounds of appeal contain no reference to the date of the hiring. [Lord Denman C. J. It is said to have been "subsequently" to the apprenticeship in the examination.] No date is given to the examination. [Lord Deuman C. J. That is the omission of the respondents.] Suppose the year 1800 had been given in the examination as to the date of the apprenticeship, it would not be sufficient for the appellants to set up a settlement by hiring and service subsequently to the year 1800; such a notice would give no convenient means of inquiry into the case. In *Reg. v. Middleton in Teesdale* (a), in addition to the point for which that case has already been cited, a question was also raised upon the sufficiency of the grounds of appeal, because they set up a settlement by renting a tenement without stating "either the nature of the tenement, or of whom it was held," and it was admitted that the objection was good. *Reg. v. Bridgewater* (b), *Rex v. Justices of Derbyshire* (c), *Ex parte Broseley* (d), *Reg. v.*

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(a) 10 A. & E. 688; S. C. 3 P. & D. 473.

(b) 10 A. & E. 693; S. C. ante, 265.

(c) 6 A. & E. 885; S. C. 1 N. & R. 703.

(d) 7 A. & E. 423; S. C. 2 N. & P. 355.

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*Justices of West Riding (a)*, and *Reg. v. Lydeard St. Lawrence (b)*, per *Patteson J.*, shew that time has always been considered material in these notices. [Lord *Denman C. J.* The appellants were bound to give all the information they possessed, but it appears they have done so.] The sessions certainly have found "that the appellants have set forth all that was within their knowledge as to time," and an observation of Lord *Denman C. J.* in *Reg. v. Bridgewater (c)*, will perhaps be relied on by them to shew that the notice is therefore sufficient. But the time of gaining a settlement must always be proved, so that there can be no reason for not stating it in the notice. [Lord *Denman C. J.* A witness might not be able to fix the time of the hiring exactly, but might still be certain that it was after the apprenticeship. Suppose the witness could fix the date to be between 1800 and 1814.] Then the date should be so stated in the notice. Although the sessions have found that the appellants have told all they knew, yet it appears that they have found this without hearing any evidence on the subject, and, if they may so find without evidence, they may overrule all the decisions of this Court.

*Merivale*, on the same side, was not heard, Lord *Denman C. J.* having called on the other side to distinguish, on the ground of objection first argued, the present case from *Reg. v. Middleton in Teesdale (d)*.

*Elliott and Bevan* contra. The notice of appeal is not bad; it need not state that the hiring was for a year, and there is an obvious distinction between an examination and a statement of the grounds of appeal in this respect—that inasmuch as an examination is the evidence on which the justices *act* in making the order of removal,

(a) 7 A. & E. 685; S. C. 3 P. & D. 462.

(b) 11 A. & E. 616; *ante*, 191.

(c) 10 A. & E. 693; S. C. *ante*, 265.

(d) 10 A. & E. 688; S. C. 3 P. & D. 473.

it must necessarily disclose all the essentials of a settlement, otherwise it would appear that they have acted without jurisdiction; whereas the statement by the appellants, being merely a *notice* of the settlement they intend to establish, there is no reason for its communicating that the hiring was a hiring for a year, as it must be either that or nothing. The appellants are not required by the Poor Law Amendment Act to give more than the *grounds* of their appeal, which are in this case the "settlement by hiring and service;" and, with respect to circumstances of time and place it has been found that every information in their possession had been communicated.

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LORD DENMAN C. J.—The question is whether the notice of appeal discloses any settlement at all. It is very difficult to lay down any rule which parish officers may not elude, but our principle is, that they must give all the information they can. I certainly do not see by what means the justices arrived at the conclusion that the appellants in this case have given all the information in their power. But it is not necessary to go into that question, because it is quite clear that, when appellants meet an examination by setting up a subsequent settlement, the settlement set up must be shewn to be a complete settlement. This seems almost a truism. It is argued that, where the appellants set up a settlement by hiring and service, it cannot be inferred that the hiring can be anything else than a hiring for a year. But why is anything to be left to inference? In conformity with *Reg. v. Middleton in Teesdale* (a), we must decide that this notice is insufficient.

PATTESON J.—If this statement of the grounds of appeal be looked at by itself, as unconnected with the examination, it is wanting in proper particularity of time, and is clearly bad. The statement is, that "the pauper acquired a settlement in the parish of Ashton, in the said county of

(a) 10 A. & E. 688; S. C. 3 P. & D. 473.

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Devon, by hiring and service, with one *Edmund Stooke*, of George Teign, in the said parish, subsequently to that acquired by him in our parish." If it had said expressly that the subsequent settlement had been gained by the hiring and service mentioned in the examination, a different question would have arisen. It might then have been for the justices to say whether, on the facts, there had been a hiring for a year. But, as the notice now is, the hiring relied on by the appellants may be a different hiring from that in the examination, for the examination is not referred to. The notice of appeal should have shewn such a hiring as would give a settlement.

WILLIAMS J.—The meaning of the Court has been, that, as well in the statement of the grounds of appeal as in the examination, a complete settlement should be set out, and that there should be given explicitly all such information as may be requisite to regulate the conduct of the adverse party, to whom the document is sent.

WIGHTMAN J. concurred.

D.

Order of Sessions confirmed.

The QUEEN v. The Justices of the WEST RIDING.

(DRIFHLINGTON v. PUDSEY (a)).

The following ground of appeal, against an order of removal, "the said J. M. did in the years 1828 &c. rent

*PASHLEY*, on the second day of Easter term, 1842, obtained a rule to shew cause why a mandamus should not issue, commanding the justices of the West Riding to enter

(a) Decided in Easter term, 1842, (May 6.)

and occupy for the space of twelve months and upwards a house and land in P. (the respondent township), of the yearly rent and value of 10*l.* and upwards, and did pay upwards of 10*l.* rent for the same, and did thereby gain a settlement in the said township." *Held*, insufficient, as the words "occupy a house and land" did not necessarily import the residence, which, as being a constituent part of the settlement, ought to have appeared on the notice.

A mandamus to the sessions to hear an appeal must be applied for promptly.

continuances, &c. and hear an appeal against an order for the removal of *Ann* the wife of *John Moorhouse*, &c. from the township of Pudsey to the township of Drighlington, both in the said riding.

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The following facts were stated in the affidavit of the attorney of the appellants on which the rule was obtained. The appeal was entered at the sessions for the West Riding, held by adjournment at Wakefield, on the 5th of January last. The appellants in their grounds of appeal relied solely on a settlement acquired in the respondent township subsequently to the settlement on which the order of removal was made, and one of their grounds of appeal was, "that the husband of the pauper, *Ann Moorhouse*, in or about the years 1828, 1829, 1830, some or one of them, or some parts of some two of such years, did rent and occupy for the space of twelve months and upwards a house and land at and in the township of Pudsey aforesaid, as tenant to one Mr. *Charnock*, of Woodhouse, gentleman, of the yearly rent and value of 10*l.* and upwards, and did pay upwards of 10*l.* rent for the same, and did thereby gain a settlement in your said township of Pudsey." The appeal came on to be tried at the above mentioned sessions on the 6th of January last, when the respondents objected that it was not competent to the appellants to give evidence in support of the said ground of appeal, inasmuch as that ground of appeal did not contain any express allegation of the residence of the said *John Moorhouse* in the respondent township. The Court, after argument, gave its decision in or nearly in the following words:—"We are compelled to decide that this notice of grounds of appeal does not disclose residence, which is a necessary ingredient in order to gain this settlement," and they refused to allow the appellants to give evidence of this ground of appeal, and confirmed the order. The appellants then applied to the Court that a special entry might be made to the effect that the order was confirmed on account of the omission in the above stated ground of appeal of all statement of residence, but the Court



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declined to direct any such special entry to be made, and the order of removal was therefore confirmed generally.

The affidavit then proceeded to account for the delay in applying for this rule, and stated that it would have been moved for in Hilary term last, but that the deponent felt it to be his duty to consult with the parish officers and inhabitants of the appellant township, and to receive their sanction for his making the application. That he therefore shortly after the sessions were over desired the assistant overseer to convene a meeting of the inhabitants, which was done. That deponent attended at the meeting, but that there was such a thin attendance of the inhabitants that they did not deem it proper to authorise the application to this Court, but directed him to take the first opportunity of consulting counsel thereupon, and then report to a meeting of the inhabitants previous to Easter term, which meeting was to determine whether the application should be made. That during the last Lent assizes at York deponent did accordingly consult with counsel upon the subject, and afterwards caused a meeting of the inhabitants to be convened, which he attended on the 1st of April, and that such meeting passed a resolution authorising the deponent to proceed in the business.

Before shewing cause on the merits it was objected that the rule should have been applied for in Hilary term. To this it was answered that no unreasonable delay had occurred, as an application for a mandamus to the justices was not like a mere notice of appeal which the parish officers might take upon themselves to give, but was an extraordinary step, as to the expediency of which it was right that they should take advice; that the appellants therefore could not reasonably be expected to come to this Court at the *beginning* of Hilary term, and that, unless they had then applied, the rule, being in a Yorkshire case, would not have been drawn up to shew cause against, before Easter term, so that no time had been lost. [Lord Denman C. J. Although there is no absolute rule of practice upon the subject, yet it should be clearly understood

that an application of this nature should be made with reasonable promptitude. I doubt whether the present application has been so made, but my brothers think that we should hear the case, as there has been no distinct notice of our practice in this respect. We certainly approve of the conduct of parish officers who do not rush hastily into litigation, but I think these applications should be made very speedily after the sessions, otherwise the situation of the litigant parties may be altered in the interval.]

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Sir *G. Lewin* and *Drinkwater* shewed cause, and contended that the grounds of appeal were insufficient, because they did not fix the date of the occupation with precision, and also because it was consistent with them that the pauper had occupied the tenement in the respondent parish by his servants, without personally residing there himself.

*Hall* and *Pashley* contra. There is a sufficient allegation of the party's residence, and, though the sessions thought otherwise, their decision was come to under a mistaken sense of legal compulsion, and is therefore not conclusive. The word "occupation" may no doubt vary in its import with the subject-matter to which it is applied, but, "as applied to a house, undoubtedly implies personal residence," per *Littledale J.* in *Rex v. Ditchet* (a).

The word must also be used in this sense in the 66th section of the Poor Law Amendment Act itself, where provisions are made with respect to settlement "by occupying a tenement." If the word "occupy" is considered equivocal, it is difficult to say what word the appellants should have employed, for it seems that the word "reside" itself might be open to objection. "The place where he lies, sleeps or eats, doth not make him a parishioner only; but also forasmuch as he manures lands in H., and by that is *resident* upon it, that makes him a parishioner:" *Jeffrey's* case (b), and the word "inhabit" would be equally uncertain: 2 Inst.

(a) 9 B. & C. 176; S. C. 4 M. & R. 151.

(b) 5 Rep. 67 a.

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702, on the Statute of Bridges. The Court will construe this notice, as it does every other instrument, ut res magis valeat, &c. There can be no doubt that the word "occupy," in its popular and natural sense, includes personal residence, and it must be remembered that this notice of appeal is the language, not of one lawyer to another, but of one parish officer to another. "Benignè interpretamur chartas propter simplicitatem laicorum:" 2 Bl. Com. 379. "It is the office of judges to take and expound the words which common people use to express their meaning, according to their meaning, and therefore it shall be here taken not according to the true definition of it, because that does not stand with the matter, but in such sense as the party intended it:" *Hill v. Grange* (a). Certainty to a common intent is sufficient in this case; "by a common intent," says *Buller J.* in *Dovaston v. Payne* (b), "I understand that where words are used which will bear a natural sense, and also an artificial one, or one to be made out by argument or inference, the natural sense shall prevail;" and see *Rex v. Mayor of Lyme Regis* (c).

The occupation alleged is in the respondent parish, so that the parties to whom the notice was sent would have no difficulty in making inquiry, and they could not ascertain the fact of occupation, as to which full particulars are given, without at the same time ascertaining the fact of residence. This case therefore stands clear of the recent decisions of this Court, which have proceeded on the necessity of contending parishes supplying to each other full information of the case intended to be set up at the sessions. [Lord Denman C. J. It has often been laid down to be essential that parties should give each other full information, but that is not of itself sufficient. Parties may generally know what is intended by each other, but we think it reasonable, when they are required to furnish each other with the "grounds" of removal and of appeal, that the ingredients necessary to make up the settlement relied on should be stated on either

(a) Plowd. 170 a.

(b) 2 H. Bl. 530.

(c) 1 Doug. 159.

side.] The precise year of the renting is not stated, but the date is given with sufficient precision. [Lord *Denman* C. J. The appellants may have given the best information they could; we certainly always desire particularity as to time.]

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PATTESON J. (a)—I admit that the word “occupy” in this ground of appeal would convey to ninety-nine men out of a hundred that the pauper’s husband resided in the house. But we have to construe a notice under an act of parliament, and the notice must have legal certainty. It is said that “occupation” in this case must mean “residence.” I do not think so, or even that the words “actual occupation” would have that meaning. A man may actually occupy a large estate which has no house whatever upon it. The word “occupation,” therefore, does not in itself necessarily involve residence; and, even in the case of houses, a man may occupy two houses in different parishes; he may reside in one house himself, and occupy the other by his servants residing in it, yet he could not himself be said to reside in the parish where the last mentioned house is situate. Some other words in addition to the word “occupy” were necessary in this case to remove doubt and to shew a residence in the respondent parish for forty days. The notice here does not necessarily import such residence, and, though our construction may appear strict, the Court has decided that such notices must state such facts as necessarily import a settlement.

WILLIAMS J.—The decisions of this Court do undoubtedly savour somewhat of strictness; but our principle has been to compel both respondents and appellants to give full information to each other of the case relied upon. In pursuance of this principle, we hold that it is not enough in these instruments, when a settlement is set up in them, to give the legal result of facts by stating generally any particular head of settlement, but that the constituent parts of

(a) Lord *Denman* C. J. had left the Court before the conclusion of the argument.

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such settlement must also be specified. The question here is, whether the occupation stated necessarily implies the residence also in the respondent parish. I do not think it does; there should have been an express allegation of residence.

WIGHTMAN J.—It follows, from the principle that a settlement must be shewn in these notices, that the residence should have been shewn in this case. Occupation does not necessarily include residence; a man may occupy lands with no house upon them, and even a house he may occupy by his servants. It is better that distinct terms should be used.

PATTESON J.—I am requested by Lord *Denman* to say that he quite agrees with us in our decision.

D.

Rule discharged (a).

(a) See *Reg. v. North Bovey*, ante, 701.

Saturday,  
Nov. 6th.

LANE v. MULLINS.

Where a plaintiff, in an action on a bill of exchange, has obtained judgment on demurrer, he is entitled, at the assessment of damages on the demurrer, to the full amount of the bill, without producing it in evidence.

**ASSUMPSIT** by drawer against the acceptor of a bill of exchange for 1125*l*.

The plaintiff had demurred to the defendant's plea, and had obtained judgment on the demurrer.

On the assessment of damages on the demurrer before Lord *Denman* C. J. at the Middlesex sittings after last Trinity term, the bill was not produced, on which the defendant's counsel contended that the plaintiff was entitled to nominal damages only, but his lordship directed an assessment of damages for the full amount of the bill.

*Wordsworth* now moved for a new inquiry, and cited *Marshall v. Griffin* (b). [Lord *Denman* C. J. The reason there given why the bill is to be produced after judgment by default, that the jury may see whether there is any in-

(b) Ry. &amp; M. 41.

dorsement of payment on it, does not apply since the late rule, which says that payment cannot be proved, unless pleaded, even in mitigation of damages.] The bill may not have the proper stamp, and it should always be produced, that the correctness of the stamp may be ascertained, for the 31 Geo. 3, c. 25, enacts not only that no bill shall be pleaded or given in evidence unless it is properly stamped, but adds, "or be good, useful, or *available* in law or equity." He cited also *Billers v. Bowles* (a), *Ellis v. Wall* (b), and *Snowden v. Thomas* (c).

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Per CURIAM (d).

D.

Rule refused.

- (a) Barnes' notes in C. P. 233.      (d) Lord Denman C. J., *Williams, Coleridge and Wightman* Js.  
 (b) Barnes' notes in C. P. 234.  
 (c) 2 W. Bl. 748.

The QUEEN v. Lady EMILY PONSONBY and others (e).

ON appeal to the Middlesex Quarter Sessions in November, 1841, against a rate made in February, 1839, for the

Hampton Court Palace has not been personally occupied by the sovereign for

(e) Decided in Easter term, 1842 (April 23rd).

about 100 years. It contains state apartments, in which there is a collection of pictures, the property of the crown, and open to public inspection. A guard of honour is always on duty at the palace, and divine service is regularly performed therein by a chaplain appointed by the crown. Sentinels are posted at the various entrances to the palace grounds, and those entrances are opened and closed at the pleasure of the crown. The housekeeper is the only servant of the crown who resides in the palace. Several apartments are occupied by private individuals, but not as annexed to any office under the crown, or in discharge of any service to the crown. These apartments are assigned by the warrant of the Lord Chamberlain, directing the housekeeper to deliver the keys of certain apartments to such persons as by the favour of the crown are allowed to occupy them. Some part of the occupier's family is required by the warrant to reside a part of every year; but no specified term or interest is granted by the warrant. Previously to such persons taking possession, the apartments are put into repair if necessary, at the expense of the crown; afterwards the occupiers themselves have to repair; but all repairs are done under the direction of the crown officers. Many of the apartments so occupied communicate with the state apartments; the doors of communication are kept locked during such occupation, but, if in the general care of the palace, the housekeeper finds it necessary to open those doors, she exercises the power of doing so and of passing through the apartments so occupied.

*Held*, that the occupiers of such apartments had such an exclusive occupation as to render them liable to the poor-rate.

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poor of the parish of Hampton in the said county, and to which rate the defendants (the appellants) were assessed as occupiers of apartments in Hampton Court Palace, the sessions dismissed the appeal, subject to the opinion of this Court upon the following case:—

Hampton Court Palace, situate in the parish of Hampton, in the county of Middlesex, was built by Cardinal *Wolsey* in the year 1514, and presented by him to King *Henry* 8th, in the year 1525; since which period, and up to the present time, it has constituted part of the royal demesnes appurtenant to the crown of England. After the decease of that monarch, the palace continued to be a place of occasional residence of the sovereigns of England until some time in the tenth year of the reign of King *George* 2nd, who was the last sovereign who personally occupied it; from which time, and up to the present date (embracing a period of upwards of a century), the palace has ceased to be a place of the actual personal residence of the crown. The palace contains a suite of rooms called “the state apartments,” all of which contain a collection of pictures, the property of the crown, to which the public, under certain regulations, are permitted to have access; a room, called by the name of “the board of green cloth,” and a gallery, which the public are not permitted to enter, and which are used as a depository for lumber. For the last sixty years the state apartments have not been used for any other purpose, and are not included in the present assessment. A guard of honour is always on duty at the palace, and divine service is regularly performed therein by a chaplain appointed and paid by the crown. The palace, as well as the gardens which surround it, are maintained and kept in order by the crown, and the produce of the gardens (which gardens are not assessed) is applied to her Majesty’s use. Sentinels are posted at the various entrances, and those entrances are opened and closed at the pleasure of the crown.

The housekeeper of the palace (who is the only officer of

the royal establishment resident in the palace) formerly employed servants to shew the pictures, and received a fee or gratuity for such view as a perquisite of office. Upon the decease of Lady *Emily Montague*, the late housekeeper, the state apartments were thrown open for the gratuitous admission and view of the public, under the superintendence of persons in the dress of police constables, but appointed and paid by the crown.

There are several other apartments in the palace which are in the occupation of private individuals. Some consist of spacious drawing rooms, dining rooms, bed rooms, servants' rooms, kitchens, and other domestic offices, suitable for the residence and accommodation of persons with considerable household establishments, and are now and always have been occupied by persons of rank and distinction, and others are occupied by persons of respectable station.

One of the parties included in the rate appealed against is a Mr. *Grundy*, the husband of the housekeeper of the palace, appointed and paid by the crown, who, as such housekeeper and for the proper performance of her duty, resides (with her husband and children) in the part of the palace set apart for her use, and in respect of which her husband is rated. With this exception, and that of some other persons similarly situated, the several suites of apartments occupied by private individuals are not enjoyed by them as appurtenant or annexed to any office under the crown, but are occupied by virtue of a written grant or warrant, made by the lord chamberlain of her Majesty's household, in the following form :—

“ These are to require you to deliver or cause to be delivered unto — the keys and possession of the following lodgings in her Majesty's palace of Hampton Court, viz. [here follows a list of the apartments, together with a description of their situation in the palace,] which lodgings are to be inhabited by — or some part of — family, a part of every year, or they will be considered vacant and disposed of accordingly; and, when the family are absent

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from Hampton Court, it is expected that one of their servants should be left in their lodgings, or that the keys thereof be left with you or the housekeeper for the time being: and for so doing this shall be your warrant. Given under my hand and seal this — day of — 18—, in the — year of her Majesty's reign. —, lord chamberlain.

“To —, housekeeper of her Majesty's palace of Hampton Court.”

In some cases the names of two or more individuals (members of the same family) have been included in one warrant.

The occupiers of these suites of apartments provide at their own expense any kind of household furniture and fixtures requisite for the furnishing and fitting up of such apartments.

Previously to occupiers taking possession of the apartments, such repairs as may be considered by the officers of the crown as necessary to be done to such apartments, are done at the expense of the crown; but in some instances, where the repairs desired for the accommodation of such occupiers have been of such a nature as to require a considerable outlay, such repairs have been effected at the joint expense of the crown and occupier; but all alterations or additional works required by the occupiers are done at their own expense, and in some instances such additional works and alterations have amounted to 1000*l.* and upwards. Afterwards the occupiers are bound, at their own expense, to do whatever internal works, alterations and repairs may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition, or which they may consider essential to their greater convenience and enjoyment; but no works, alterations and repairs are done except under the directions of the officers of her Majesty's Office of Woods, &c., and the government contracting tradesmen are employed and paid by the occupiers of the apartments.

A periodical survey is made of the apartments every

second year by the officers of the crown, and a report made of the repairs necessary for placing them respectively in tenantable repair; and notices (of which the following are copies) are given by the crown to the occupiers, to have such repairs done, which are done by them accordingly:—

“ Office of Woods, &c. 20 March, 1841.

“ In pursuance of her Majesty’s command, signified to the chief commissioner of her Majesty’s Woods, &c. an inspection of the several apartments at Hampton Court palace, held by grace and favour of her Majesty, will take place in the ensuing summer, and in the summer of every succeeding second year, of which due notice will be given to each of the several occupiers, who after such survey and inspection will be required to execute whatever internal works and repairs may be found necessary for keeping up and preserving the apartments in a proper and tenantable condition.

(Signed) *Duncannon.*

A. Milne. Cha. Gore.”

“ Her Majesty’s Office of Woods, &c. 22 Sep. 1841.

“ Referring to the notice of 20 March last, addressed to you by this board, I beg to inform you that a survey has been made of the present state of the interior of the apartments you occupy by the grace and favour of the sovereign in Hampton Court palace, and the repairs, &c. (according to the statement on the other side) are reported as necessary for placing your apartments in tenantable repair. I am, on behalf of the commissioners of her Majesty’s Woods, &c. to request that you will, at your earliest convenience, give directions for executing the works enumerated, which must be done under the directions of the officers of this board.

(Signed) *A. Milne.*

“ The apartments require a general repair; painting, white-washing, &c. (or as the case may be, varying according to circumstances.)”

The number of families now occupying such suites of apartments in the palace may be taken to amount to from

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60 to 70, and the number of servants in their employment may be computed on an average at between 150 and 200.

Instances exist in which the holders of warrants for such apartments derive considerable pecuniary emolument to themselves by accommodating other persons with the use of the same in consideration of sums of money paid in gross and also by way of yearly rent; and instances have occurred where others have derived emolument by taking in inmates or lodgers to board and lodge, or only to lodge, with them in such apartments, and others by carrying on or exercising their several trades or professions therein, but none of these acts have been done with the sanction or privity of the crown.

Many apartments occupied by private individuals communicate with the state apartments, and the doors of communication are kept locked during such occupation; but, if, in the general care of the palace, the housekeeper finds it necessary to open these doors, she exercises the power of doing so, and of passing through the apartments which are so occupied.

Some of the apartments have exclusive outward entrances, opening upon the public high road and barge walk.

In the sixth year of the reign of King *William 3* and Queen *Mary*, the parishioners of Hampton, feeling themselves peculiarly aggrieved by the increased charges on the parish funds, arising from the relief of poor persons who followed the court, and by workmen then engaged in the alterations making at the palace, petitioned the crown for redress, when their Majesties were pleased to grant to them an annual pension of 50*l.*, payable out of the receipts of the Exchequer, by writ of privy seal, of which writ the following is a copy:—

“ October, 1694. Anno Regis et Reginae *Gulielmi et Mariae* sexto. Poore of the towne of Hampton. Pension. A warrant unto the Exchequer to pay out of monies (not appropriated to particular uses by act of parliament) to the churchwardens of the parish of Hampton for the time being

a pension of fiftie pounds yearly during their Majesty's pleasure, for the support of the poore of that towne, at four quarterly payments, to commence from Michaelmas last, and to be distributed by the said churchwardens as the vicar of the said parish and the under housekeeper of their Majesties royal palace of Hampton Court shall direct. Subscribed by Sir *John Nicholas*, by warrant under his Majesty's royal sign manual; countersigned by the lords commissioners of the Treasury. Dated the 18th ."

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This pension has from time to time varied in its amount, by reason of the land tax and other taxes attaching on it. For some years immediately following the time of the grant, it was received by the under housekeeper of the palace, and distributed by him at his discretion. It has for many years last past been received by the churchwardens, and applied by them in aid of the funds created and established by and with the other charitable donations given generally by the donors to the use of the poor of the said parish of Hampton.

If the Court shall be of opinion that the appellants were rateable in respect of their several occupation of the premises, then the said rate and the order of sessions confirming the same shall stand confirmed; but, if the Court shall be of a contrary opinion, then the said rate and the order of sessions confirming the same shall be quashed.

Erle, Kelly and *Adolphus*, in support of the order of sessions (a). The persons rated are occupiers. Hampton Court is not now a place of royal residence; and, as the exemption of the sovereign from rateability is personal, that exemption cannot be extended to others who happen to occupy the property of the sovereign. In *Rex v. Terrott* (b), where the commanding officer was held rateable for certain

(a) It was agreed that the husband of the housekeeper was not rateable, and that the case should

be argued with reference to the other persons included in the rate.
(b) 3 East, 514.

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apartments in which he resided in barracks, the law respecting the rateability of persons occupying crown property is clearly explained by Lord *Ellenborough* C. J. "If the party rated," he observes, "have the use of the building or other subject of the rate as a mere *servant* of the crown, or of any public body, or in any other respect, for the mere exercise of *public duty* therein, and have no *beneficial occupation* of or emolument resulting from it in any personal and private respect, then he is not rateable. The property of the crown *in the beneficial occupation of a subject*, whether he be a civil officer of the crown, as in Lord *Bute's* case (who was ranger of the new park near Richmond), and in the case of the comptroller of Chelsea Hospital, *Eyre v. Smallpage*, 2 Burr. 1059 (a), or as a military officer, as in *Hurdis's* case (b), is in each case equally rateable: for in these cases each of the persons rated had a degree of personal benefit and accommodation from the property enjoyed by him *ultrâ* the mere public use of the thing; and which excess of personal benefit and accommodation *ultrâ* the public use may be considered as so much of salary and emolument annexed to the office, and enjoyed in respect of it by the officer for the time being. But if the use of, or residence upon, the property be, either as the servant of the crown and for public purposes only, as in Lord *Somers's* case (c), or as a mere public officer or servant, or of any other description, such as the superintendent of the Philanthropic Society, *Rex v. Field*, 5 T. R. 587, the trustees of a meeting-house, the servants at St. Luke's, the masters in Chancery (d) in respect of their public offices; in all such cases the parties having the immediate use of the property merely for such purposes are not rateable; because the occupation is throughout that of the public, and of which public occupation the individuals are only the means and instruments." The law, as laid down in this passage, is

(a) Cited there.

(b) 3 T. R. 497.

(c) 2 T. R. 372.

(d) 3 B. & P. 129.

supported by the cases there cited, and also by *Rex v. Matthews* (a), the case of the *Officers of Greenwich Hospital* (b), and *Rex v. Governor and Company of Chelsea Waterworks* (c).

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So in another class of cases, not relating to the occupation of crown property, it has been held that persons who are in the occupation of almshouses are rateable: *Rex v. Munday* (d), *Rex v. Green* (e). [*Rex v. St. Giles, York* (f), *The Governor of the Poor of Bristol v. Wait* (g), and *Rex v. Mayor of York* (h), were also then referred to.]

On the other hand, where crown or public property is occupied solely for the performance of a duty to the crown or to the public, without any beneficial occupation, the occupier is not rateable: *Lord Amherst v. Lord Sommers* (i), *Rex v. Sculcoates* (k), *Reg. v. Exminster* (l), *Reg. v. Justices of Worcestershire* (m).

On what ground can it be contended that the appellants in this case are not rateable? They do not occupy in order to perform any service for the crown or the public; so that their occupation must be beneficial; and the power of the housekeeper to enter certain of the apartments is analogous to the right often reserved by landlords for the purpose of ascertaining the state of repairs, and does not render the occupation the less exclusive. It is immaterial that the crown occupies by its housekeeper so much of the palace as constitutes the state apartments. There was a part occupation by the crown in *Lord Bute v. Grindall* (n) and *Rex v. The Chelsea Waterworks Company* (c). The last case shews also that a party may be rateable, though his

(a) Cald. 1.

M. 383.

(b) Cited 2 Burr. 1059.

(h) 6 A. & E. 419; S. C. 1 N.

(c) 5 B. & Ad. 156; S. C. 2 N.

& P. 539.

& M. 767.

(i) 2 T. R. 372.

(d) 1 East, 384.

(k) 12 East, 40.

(e) 9 B. & C. 203; S. C. 4 M.

(l) 4 P. & D. 69.

& R. 164.

(m) 11 A. & E. 57; S. C. 3 P.

(f) 3 B. & Ad. 572.

& D. 8.

(g) 5 A. & E. 1; S. C. 6 N. &

(n) 1 T. R. 338.

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occupation is at the will of another, and not necessarily of a permanent character. By the statute of 43 *Eliz.* c. 2, the rate is to be raised from week to week. The appellants or their servants may gain settlements in the parish; it is fair therefore that they should contribute to bear its burdens.

Sir *F. Pollock* A. G. and *Hodges*, contra. The law relative to this subject is clear; and the question now before the Court is rather a question of fact. The appellants in this case are not rateable; because it is plain, upon the facts stated, that they have no tenancy, occupation, or legal interest whatever, but merely a permissive use which is not exclusive. In *Lord Bute v. Grindall* (a) *Lord Bute* was found to be the occupier of the arable land at least; and in *Rex v. Chelsea Waterworks Company* (b) the company had an exclusive occupation of the reservoir and pipes, and the judgment proceeded upon that ground. "In order to constitute a rateable occupier, it is necessary not only that the person should have possession, but that he should have such a control and dominion over the subject as implies freedom from any *paramount* occupation, or direct interference by a superior with his domestic arrangements and internal management." "No lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier:" 1 *Nol.* P. L. 175 (c), and the authorities there cited, and *Rex v. St. Mary the Less, Durham* (d). Suppose the sovereign were not exempt from rateability, he would clearly be rateable for the whole of Hampton Court Palace, for the sovereign clearly occupies the gallery by the housekeeper. The sovereign may return and reside at the palace at any time, and this Court will not enter into a speculation as to the probability or improbability of the sovereign so returning.

(a) 1 T. R. 338.

(c) 4th ed.

(b) 5 B. & Ad. 156; S.C. 2 N.

(d) 4 T. R. 477.

& M. 767.

The appellants are mere guests, having the temporary use of certain apartments by the grace and favour of the crown, and are no more rateable than a person who is allowed the use of a friend's house during his temporary absence. A mere privilege or use, without exclusive occupation, cannot be the subject of rateability: *Rex v. The Undertakers of the Aire and Calder Navigation* (a). The gallery of pictures is clearly in the occupation of the crown, and the other apartments are under its control and superintendence. There is no immediate recognition by the crown of the person entering into occupation of these apartments, but the necessary communication is made by the crown to its own servant, the housekeeper. The housekeeper may at any time enter any of the apartments; and all repairs are done by or under the special direction of the crown. The palace is still a royal residence: *Winter v. Miles* (b), *Rex v. Stobbs* (c); and a poor rate could not be levied under an ordinary warrant of distress.

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Lord DENMAN C. J.—I agree with the sessions that the appellants are occupiers, and that they are rateable. I also agree with what has been suggested in argument that the question referred to us is very much a question of fact. We may take it either that the sessions have formed their own opinion on the fact of occupation, and that they ask us whether there was *any* evidence to warrant their conclusion, or that they refer the whole matter to us. I think they had before them sufficient evidence that the appellants had each a separate occupation; and, if I had been called upon as a jurymen to pronounce upon the same evidence, I should have come to the same conclusion. It is clear that Hampton Court was once a royal residence, and equally clear that it has ceased to be so. Some of the cases as to rateable occupation are stronger than the present, particularly that

(a) 9 B. & C. 880; S.C. 4 M.
 & R. 728.

(b) 10 East, 578.

(c) 3 T. R. 735.

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of *Lord Bute v. Grindall* (a), in which there was a joint occupation and possession, as it were, on the part of the crown with Lord *Bute*, who was, notwithstanding, held rateable. In this case it is many years since the crown has taken possession. Certain apartments in the palace are kept for the public use, and the palace is guarded by sentinels; but these circumstances do not constitute personal occupation on the part of the crown. The delivery of the keys by the housekeeper does not vary the case, and is quite consistent with the notion that the appellants have an independent occupation; though at the same time it is a strong fact to shew that the crown exercises a sort of paramount control and superintendence over all the apartments. The Attorney-General put it ingeniously whether, as the crown occupied part of the palace, the crown, if not exempt from rateability, would not be rateable for the whole palace; and Mr. *Hodges* put the case of a gentleman going abroad, and leaving his house for the use of a friend, and asked whether the friend would be rateable. The same answer may be given to both the cases put; the party allowed to occupy would be rateable. Two or three cases in the opposite direction come near this. In *Rex v. St. Mary the Less, Durham* (b), the appellant, who had a lathe in the house in question, and never resided there himself, but out of charity allowed a poor person to occupy the kitchen, was held to occupy by his lathe, and to be rateable for the whole house. But that case is not directly applicable, for it was not there held that the occupier of the kitchen was *not* rateable for his portion of the house: if he had been rated for the kitchen, and if it had been held that he ought not to have been, that case would then have been applicable. In the present case we have no doubt that the appellants have a beneficial and exclusive occupation, and that they are rateable.

PATTERSON J.—I had no doubt until the Attorney-General

(a) 1 T. R. 338.

(b) 4 T. R. 477.

put it that, supposing the prerogative of the crown not to exempt it from rateability altogether, the crown would be rateable for the *whole* palace, because it is the owner of the whole and occupies a part. But, upon consideration, I think that is not a sound argument. A person may be assessed to the poor rate for part of a house; for the statute of *Elizabeth*, in directing the taxation of occupiers of houses, does not mean the occupiers of entire houses merely. Accordingly in *Ayr v. Smallpeace* (a), the comptroller of Chelsea College was held rateable for apartments, and in *Rex v. St. Mary the Less, Durham* (b), which has been commented on by my lord, it was not denied that the owner of the house was rateable for so much of the house as was occupied by himself. In a case of burglary the question would be very different. A question might certainly arise in burglary, whether the apartments occupied by the appellants are their dwelling-houses, for in the case of *Williams* (c), where the lodgings of Sir *H. Hungate*, at Whitehall, had been broken into, it was thought the indictment should be for breaking the king's mansion-house, called Whitehall. The king, however, then resided at Whitehall, so that it was certainly his dwelling-house. So in *Rex v. Peyton* (d), which was an indictment for stealing in the dwelling-house of Mr. *Bunbury*, it appeared that the house in question was the Invalid Office, at Chelsea, that the ground floor was used for the office of the Paymaster-General, and the whole of the upper part occupied by Mr. *Bunbury*, but that government paid the rent and taxes for the whole house. It was there held that the charge for stealing in the dwelling-house of Mr. *Bunbury* could not be sustained. But cases on the question of how the proprietorship of a dwelling-house should be laid in an indictment for burglary do not apply to establish the proposition, that different persons may not be charged to the poor, as occupiers of different

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(a) Bott, 154, 6th ed. by T. Pratt; cited also in 2 Burr. 1059.

(b) 4 T. R. 477.

(c) 1 Hale, P. C. 522.

(d) 1 Leach, 324.

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parts of a house. The question here is, whether the appellants have not an exclusive occupation of the apartments for which they are rated. When they enter upon their occupation the keys of their apartments are delivered to them; they are to be inhabited by the family a part of every year, and when the family are absent a servant must be left in the occupation, or the keys delivered to the housekeeper. It is quite clear to me that the warrant assigns to each occupier the exclusive occupation of his apartments. The housekeeper may certainly enter them, if she thinks proper to do so, for the general care and superintendence of the palace, but that is merely a condition annexed to the holding, or is a reservation, which does not render the occupation otherwise than exclusive for the purposes of rating. Lord *Bute's* case is much stronger than the present, for the crown there had a joint occupation with him; as to the arable land, when it was sown with corn Lord *Bute* furnished the seed, and, when it was sown with rye grass or clover, the crown furnished the seed, and in either case the crown always furnished the labour necessary for cultivation.

WILLIAMS J.—I am of the same opinion. No doubt was raised as to one part of the case—it was not denied that the occupation is beneficial. Even if the appellants had been servants of the crown, for which supposition there is no pretence, it is clear from *Rex v. Terrott* (a) that any occupation, ultra that which is necessary to the performance of the service, would be considered a beneficial occupation, and would be the subject of rateability. With respect to the quantity of interest which the appellants have in their apartments, it is immaterial whether they have a permanent occupation or not; even if it be conceded, and it is a large concession, that their occupation was not permanent, they are still rateable. In *Rex v. The Chelsea Waterworks Company* (b) it was argued that there was no

(a) 3 East, 514.

(b) 5 B. & Ad. 156; S. C. 2 N. & M. 707.

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certain permanent or exclusive occupation. The Court decided at once that the company were rateable in respect of the pipes laid down in the Green Park, and in respect of the reservoir, as to which part of the case the Court took time to deliberate, Lord *Denman* C. J., in delivering its judgment, observed, "We are of opinion that the warrant gave to the company as much interest in the space where their reservoirs are made, as in that where their pipes are laid. It is impossible to distinguish the one from the other. Their interest, indeed, in the former is expressly, in the latter by implication, at will only; but a tenant at will is, until the will be determined, an occupier of the land." "They appear to us to have the exclusive right in a portion of the soil in both cases, though for a limited purpose only." Conceding, therefore, that the appellants in this case were not permanent occupiers, there still remains the beneficial occupation of rateable property. Is then the palace to be deemed a place of royal residence? If it is, there is an end of the question. But no presumption of such a fact arises upon this case; but rather of the contrary. The housekeeper is the only servant of the crown who occupies any part of the palace, and she has the power of entering certain apartments, besides the state apartments, for the purpose of taking care of the palace. But her power of so entering them has merely the effect of diminishing the quantity of the interest enjoyed by the appellants, and they are not the less occupiers. Lord *Bute's* case is quite *ad idem* with the present case, or rather the present is an *à fortiori* case.

It is quite right to concede that the housekeeper is not rateable.

WIGHTMAN J. declined to give any opinion, as he had been counsel in the case, and had also a personal interest in the question.

Order of Sessions confirmed.

Rate to be amended by striking out the name of the housekeeper.

D.

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The QUEEN, on the prosecution of R. H. PARR, v. The Mayor, Aldermen, and Burgesses of POOLE.

A return stating excuse for non-compliance with a peremptory writ of mandamus is inadmissible.

An attachment cannot be granted against the "mayor, aldermen and burgesses" of a borough for disobedience to a peremptory writ of mandamus requiring them to pay a sum of money secured by a compensation bond under the corporation seal, but the particular individuals, who have been concerned in disobeying the writ must be named in the rule for the attachment.

A peremptory writ of mandamus, requiring a corporation to enforce payment of the existing borough rates, or to cause to be collected another rate, and out of the same to pay money due under a compensation bond, is bad, because it directs payment to be provided in a particular mode, by making or enforcing a borough rate, without shewing that the existing borough fund is insufficient; and the objection may be made, as an answer to a rule for an attachment against those who have disobeyed the writ.

A PEREMPTORY mandamus had issued on the 25th November, 1839, to the defendants, commanding them to "enforce payment of the existing borough rates of the said borough, or make and cause to be collected another borough rate for the said borough, and with the same to pay to the said R. H. Parr" a sum of money therein mentioned, as part unpaid of two instalments due to Mr. Parr in respect of a compensation bond, under the seal of the borough, and executed and delivered to Mr. Parr, conditioned for the payment of 4500*l*.

In Hilary term, 1840, a return under the common seal to this writ was filed by the defendants, stating that they had used their best endeavours to obey the writ, by making a rate and endeavouring to levy it, and that they had met with difficulties on the part of the parish officers, and had not been able to collect the sum required.

In the same term a rule was obtained calling upon the defendants to shew cause why the return should not be taken off the file of this Court, and why writs of attachment should not issue against them for their contempt in not obeying the peremptory writ.

Crowder and Barstow in Easter term, 1840, (May 12), shewed cause [Lord Denman C. J. How can there be any other return to a peremptory writ than that it has been obeyed? *Patteson J.* The proceeding by mandamus would be endless, if such a return as this were allowed to be made; if we were to decide against this return, and issue another peremptory writ, the corporation would make another return to that, and so ad infinitum.] They then

shewed cause [Lord Denman C. J. How can there be any other return to a peremptory writ than that it has been obeyed? *Patteson J.* The proceeding by mandamus would be endless, if such a return as this were allowed to be made; if we were to decide against this return, and issue another peremptory writ, the corporation would make another return to that, and so ad infinitum.] They then

shewed cause against the rule for the attachment, and contended that the attachment could not issue against the whole corporation, but that the particular members of the corporation, who had disobeyed the process of the Court, should have been named in the rule.

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Erle and *Ball* contra. The corporation generally are directed to obey the writ, and it is impossible to find out which individual members of the corporation set themselves in opposition to the writ. No one, unless he is there present, can know what passes at the council.

LORD DENMAN C. J.—In *Buller's Nisi Prius*, 201, it is said, “if no return be made, the Court will grant an attachment against the persons to whom the mandamus was directed: with this difference, however, that where a mandamus is directed to a corporation to do a corporate act, and no return is made, the attachment is granted only against those particular persons who refuse to pay obedience to the mandamus.” That seems to apply to this case, though it is not a case of disobedience in making no return to the writ, but of disobedience in making a return by way of excuse to a peremptory writ, instead of complying with its mandate. The whole corporation, working people and all, are proceeded against, whereas the council are the governing body. Common justice requires that the particular individuals charged should have distinct notice, and an opportunity of defending themselves before the attachment can go against them. The present rule may include persons who are most anxious to obey the process of the Court.

LITLEDALE J.—Unless the names are mentioned, how is the sheriff to know who the mayor, aldermen and burgesses are?

PATTESON J.—The burgesses, by the corporation act

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have no right to interfere in the business of the corporation ;
 how can the attachment go against them ?

Rule absolute for taking the return off the file.
 Rule for the attachment discharged.

In Trinity term, 1840, a rule was obtained, calling upon the mayor, four of the aldermen, and sixteen of the councillors of the borough, by name, to shew cause why writs of attachment should not issue against them for their contempt in not obeying the above writ. The rule was drawn up on an affidavit stating, in the usual form, that a copy of the writ had been served on, and the original writ itself shewn to, each of the defendants.

Crowder, Barstow and Cockburn in the same term (June 16) (a) shewed cause for different defendants.

Erle and Ball contra.

Cur. adv. vult.

LORD DENMAN C. J. at the sittings after Easter term, 1841 (May 10), delivered the judgment of the Court as follows:—In this case a bond had been executed by the corporation of Poole to pay the prosecutor a sum of more than 4000*l.* by instalments. An action had been brought upon it, and judgment was for the plaintiff, but no payment was made. The mandamus issued to the corporation to pay out of the existing rate or to impose a new rate. To this a return was made so utterly inapplicable and absurd that it was summarily quashed on motion, and might properly have exposed those who signed it to process of contempt. Thereupon a peremptory mandamus was awarded, and to this also a return was made. This was not permitted to be argued, no return to a peremptory mandamus being under any circumstances receivable. The peremptory man-

(a) Before Lord Denman C. J., *Littledale* and *Patteson* Js.

damus was still not obeyed, and for this disobedience the corporation is said to be in contempt, and a rule for an attachment against them, obtained on very long affidavits and opposed by others of equal length, was fully argued before us.

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We can take no notice of the political movements which have agitated the town of Poole in this late stage of the proceedings. No other question can now be raised than whether the mandamus itself is good in law. The disobedience is fully proved and not denied. But any objections to its validity may still be taken. If they had been pointed out before and held fatal, we should have been bound to abstain from enforcing it, and cannot now issue an attachment if the writ itself be vicious. Now it recites the bond and that two instalments are due and unpaid, and that frequent applications have been made to the mayor, aldermen, and burgesses to pay the same and to enforce payment of the existing borough rate or to make and cause to be collected another rate, but that notwithstanding a great part of the two instalments is still unpaid; it then proceeds to peremptorily command the said mayor, &c. to enforce payment of the existing rate or to impose another, and out of the same to pay those instalments to prosecutor.

One objection arose from the Municipal Reform Act, which enables the town council only to make rates, and was therefore said to render them alone responsible to the law for improperly refusing to make them. The answer given was that in that respect they represent the corporation, and the corporation must be called upon to do all acts necessary for the performance of their corporate functions, though the duty in particular cases may be thrown on some sections of the general body. But we do not find it necessary to discuss this objection, because another was pointed out to which no answer can be given. It arises in the mandatory part of the writ, which does not simply enjoin payment, leaving the corporation to apply the necessary means, but specifies the means by which payment is

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to be obtained, leaving no option of resorting to any other. No reason is assigned for requiring payment out of the present or any future rate more than by the application of any other fund which the corporation may possess. By the clause (66) enacting compensations, they are to be paid out of the borough fund, not out of that portion of it which consists of rates. Nor is there any allegation in the mandamus that the corporation have no other fund from which the payment may be drawn, or have excused themselves by reason of a deficiency of these rates alone. Nothing then appears to justify the prosecutor in selecting the particular mode of raising funds for the payment of his compensation, and his writ is misconceived in its most important clause. It follows that we should not be justified in enforcing obedience to it by attachment. It was laid down that after a return made no objection can be taken to the writ in the case of *Rex v. The Mayor and Corporation of York (a)*, but this cannot now be considered as law, this Court having in numerous cases permitted such objection to prevail, where a return has been argued. *Rex v. The Margate Pier Company (b)* is clear on this point, and also an authority expressly shewing that the objection to the present writ is a good one.

D. Rule for the attachment discharged.

(a) 5 T. R. 66.

(b) 3 B. & Ald. 220.

The QUEEN v. The Guardians of the HARTLEY WINTNEY UNION (c).

An order of quarter sessions, in a bastardy case, must state that the case has been transmitted from the petty sessions.

RAWLINSON, in Hilary term, 1841, had obtained a rule to shew cause why an order of the quarter sessions for the county of Southampton, which had been brought up by certiorari, should not be quashed.

The order was in the following terms:—"Southampton,

(c) Decided at the sittings after Easter term, 1841 (May 10).

to wit. At the general quarter sessions of the peace, &c. holden at the castle of Winchester, in and for the said county of Southampton, &c. (the 31st December, 1839), before &c. Whereas a female bastard child was born on 28th March last, in the parish of Odiham, within the Union of Hartley Wintney, in this county, on the body of &c., single woman, which said bastard child, by reason of the inability of the mother of such child to provide for its maintenance, has become chargeable to the said parish, and the guardians of the said union having made diligent inquiry as to the father of such child, and due notice having been given to *S. R.*, of the said parish &c., of the application hereunder mentioned intended to be made, the said guardians have applied to this Court for an order on the said *S. R.*, the person whom they charge with being the putative father of such child, to reimburse the said parish for its maintenance and support; and the said guardians, not having produced any agreement of the said *S. R.*, and the said *S. R.* having appeared at this Court by his attorney, at the time when such application came on to be heard, this Court hath proceeded to hear, and hath heard evidence thereon, and not being satisfied that the evidence adduced sufficiently supported the charge against the said *S. R.*, do not think fit to make any order on the said *S. R.*, but do order and direct that the sum of 19*l.* 19*s.* 4*d.*, being the full costs and charges incurred by the said *S. R.* in resisting such application, shall be paid by the said guardians."

The case had already been discussed, on shewing cause against the rule for issuing the certiorari, before *Putteson J.* in the Bail Court, in Michaelmas term, 1840, and the grounds of objection to the order will best appear from the following judgment (a) of the learned judge on disposing of that rule:

"The question in this case arises under the statutes 4 & 5 *Will.* 4, c. 76, and 2 & 3 *Vict.* c. 85, ss. 1 and 3. By the former act, the justices in the Court of Quarter Sessions have power to hear applications by parish officers for

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(a) From 9 Dowl. P. C. 176.

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charging the putative father of a bastard child, and to make an order on him; or, in case they do not make such order, to give him the costs of resisting the application. By the latter act, the power of hearing such applications is given to justices in special or petty sessions; and it is enacted, that, 'after the passing of this act, it shall not be lawful to make any such application to any Court of General Quarter Sessions, nor shall any Court of General Quarter Sessions have any authority to make any order upon any such application.' The third section however provides that, if the person charged shall declare to the justices at petty sessions that he is desirous that the charge shall be heard and determined at the quarter sessions, and shall enter into recognisance as there directed, then the justices in petty sessions shall not proceed further, but shall take such recognisance and transmit it to the clerk of the peace; and in such case all further proceedings in the matter of such charge shall be had before the said Court of Quarter Sessions, as if this act had not been made.' The effect of these enactments clearly is to give authority to the Court of Quarter Sessions only under certain circumstances and on certain conditions. The existence of those circumstances, and the performance of those conditions, do not raise a mere question, whether a party has put himself in a situation to be heard at the quarter sessions, but a question as to the jurisdiction of the quarter sessions. In the present case the circumstances existed, and the conditions were performed, as appears by affidavits. But it is contended that those affidavits cannot be received, and that the order of quarter sessions must, on the face of it, shew all that is necessary to give the Court jurisdiction. The order does not shew that; for it merely states the application of the guardians to the Court of Quarter Sessions, the determination of the Court not to make an order on the person charged, and an award of costs in his favour. It is in the same form as if the quarter sessions had general original jurisdiction under 4 & 5 Will. 4, not a jurisdiction arising from the transmis-

sion of the recognisance, &c. under 2 & 3 *Vict.* Such being the state of facts, I am of opinion that the writ of certiorari prayed for by this motion must go. I cannot find any distinction laid down between orders by justices in quarter sessions and out of quarter sessions. In either case it is necessary that the order should shew, upon the face of it, that they have jurisdiction. Now the statute of 2 & 3 *Vict.* expressly enacts that they shall not have authority, unless the case be transmitted to them from the petty sessions. They should therefore have stated in their order that it was so transmitted."

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G. T. White shewed cause. Although the 1st section of 2 & 3 *Vict.* c. 85, takes away the original jurisdiction of the quarter sessions with respect to bastardy orders, yet by the 3d section, when the charge is removed by the putative father from the petty sessions, the quarter sessions are then to proceed with the charge "*as if this act had not been made.*" Now if the act of *Victoria* had not been made, the quarter sessions would have had *original* jurisdiction in the matter, and might have made this order under 4 & 5 *Will.* 4, c. 76. The present order, therefore, which is sufficient under 4 & 5 *Will.* 4, c. 76, cannot be objected to because it omits to recite the preliminary proceedings under the later act, which, so far as the order is concerned, is to be considered as if it had never passed. The defendants, who now object to the jurisdiction of the quarter sessions, were the persons who appealed to that jurisdiction, and procured the order to be made. It is an established rule, that every intendment is to be made in favour of an order of justices.

Rawlinson contra was not heard.

LORD DENMAN C. J.—We quite agree with the judgment delivered on making the rule absolute for issuing the certiorari. The facts necessary to the jurisdiction of the quarter sessions should have appeared on the face of the order.

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PATTESON and WILLIAMS Js. concurred.

D. Rule absolute (a).

(a) See *Reg. v. Justices of Wiltshire*, 406, and *Reg. v. Justices of West Riding*, ib. (Hil. T.)

BICKFORD and others v. SKEWES.

The specification of a patent instrument called the Miners' Safety Fuse, after describing the manner in which the case of the instrument was to be made, proceeded thus, "by means whereof I embrace in the centre of my fuse, in a continuous line throughout its whole length, a small portion or compressed cylinder or rod of gunpowder, or other proper combustible matter prepared in the usual pyrotechnical manner of firework for the discharge of ordnance.

LORD DENMAN C. J. in this case, delivered the judgment of the Court as follows : (b)—This was an action for the infringement of a patent, tried before my brother *Coleridge*

(b) In Trinity term last (June 11). The case was tried before *Coleridge* J. at the Devon summer assises, 1839, and was argued before Lord *Denman* C. J. *Patteson*, *Williams* and *Coleridge* Js. in Easter term last (April 21 and 22), by *Erle*, Sir *W. W. Follett*, *Crowder* and *M. Smith* for the plaintiffs, and by Sir *J. Campbell* A. G. *Bompas* Serjt. and *Butt* for the defendant.

The cases cited were *Hornblower* v. *Boulton*, 8 T. R. 95; *Crossley* v. *Beverley*, 3 C. & P. 513; *Hullett*

v. *Hague*, 2 B. & Ad. 370; *Hardcastle*, 1 Bing. N. C. 182; S. C. 4 M. & Scott, 720; *Turner* v. *Winter*, 1 T. R. 602; *Hile* v. *Thompson*, 3 Mer. 622; *Rex* v. *Wheeler*, 2 B. & Ald. 345; *Savory* v. *Price*, Ry. & M. 1; *Bloxam* v. *Else*, 6 B. & C. 169; S. C. 9 D. & R. 215; *Crompton* v. *Ibbotson*, Danson & L. 33; *Sturz* v. *De La Rue*, 5 Russ 322; *De Rosne* v. *Fairrie*, 5 Tyr. 393, S. C. 2 C. M. & R. 476.

or compressed cylinder or rod of gunpowder, or other proper combustible matter prepared in the usual pyrotechnical manner of firework for the discharge of ordnance.

In an action on the case, for infringing the patent, issue was joined on a plea denying that the patentee had by his specification particularly described and ascertained the nature of the invention, and in what manner the same was to be performed.

At the trial it was objected that the plaintiff had not shewn that any other material but common gunpowder had ever been used in the fuse, or, if introduced, would answer the purpose.

Held, 1. That the question as to the sufficiency of the specification was for the jury.

2. That the language of the specification was not to be astutely construed so as to overthrow the patent, and that it was for the defendant to make out his objection clearly.

3. That the former part of the objection, that any other material but common gunpowder had ever been used in the fuse, was immaterial, because although other materials not specified, but still within the description given, would answer the purpose, no ambiguity was occasioned, nor was the difficulty of hereafter making the instrument increased, by the introduction of the terms which imported that the patentee himself had ever used other materials than gunpowder in the construction of the instrument.

at Exeter, in which a verdict passed for the plaintiffs on all the issues. A rule was obtained for leave to enter a verdict for the defendant on the fourth issue, or for a new trial; this was argued before us in the last term, and is now to be disposed of.

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The invention professed to be of an instrument for igniting gunpowder, when used in the operation of blasting rocks and in mining, and was denominated the Miners' Safety Fuse. The fourth plea set out the specification at length, and concluded by denying that the patentee had particularly described and ascertained the nature of the said invention, and in what manner the same was to be performed. Issue was joined on this, and upon the close of the plaintiff's case it was objected that the specification was defective in two respects, and that the judge ought to direct a verdict for the defendant. He thought that the question as to both was for the jury; he therefore at the close of the case explained to them the specification, and drew their attention to the supposed defects as said to appear on the evidence, and left it to them to say whether they were made out or either of them. We think he could not properly have pursued any other course.

The specification, so far as is material to be now stated, runs thus: "The instrument I manufacture, by the aid of machinery and otherwise, of flax, hemp, or cotton, or any other suitable materials, spun, twisted and countered, and otherwise treated in the manner of twine spinning and cord making, and by the several operations hereinafter, and in and by the drawings hereunto annexed, mentioned and described, *by means whereof* I embrace in the centre of my fuse, in a continuous line throughout its whole length, a small portion or compressed cylinder or rod of gunpowder, or other proper combustible matter, prepared in the usual pyrotechnical manner of firework for the discharging of ordnance." Upon these words it was at first objected that the plaintiff had failed to shew that any other material but common gunpowder had ever been used in the fuse, or, if introduced,

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would answer the purpose desired. And the first part of this objection is true in fact, but it seems to us immaterial, for, if other materials not specified, (and it is certainly not necessary to specify all), but still within the description given, will answer the purpose, no ambiguity is occasioned, nothing that will mislead the public, or increase the difficulty hereafter of making the instrument, by the introduction of terms which import that the patentee has himself used them. The latter part of the objection, if true in fact, would have been more material, because it does tend to mislead, if it be stated that a whole class of substances may be used to produce a given effect, when in fact only one is capable of being used successfully. But there was reasonable evidence that other combustible substances, prepared in the manner described in the specification, would, if introduced, answer the purpose of the patent. Colonel Pasley, a most competent witness, had no doubt that one substance answering the description, namely, detonating powder, might be used, and the jury were at liberty to infer that any similar substance, prepared as required by the description, would have the same effect. The other parts of the instrument necessarily limited the combustible substances to be used to such as are capable of being reduced to a fine powder, and introduced in a very thin continuous stream or thread into the centre of the fuse. Some knowledge of pyrotechnics is and may properly be required in the person who is to read the specification for the purpose of making the instrument. The specification is addressed not to persons entirely ignorant of the subject-matter, but to artists of competent skill in the branch of manufacture to which it relates, and such persons would be at no loss to select (if selection were at all necessary) the proper combustible material from those prepared for the discharge of ordnance, for their purpose. But the jury probably thought, and on the evidence might well think, that the language of the specification was in this part literally true, and that no selection at all was necessary. And this brings

us to the last objection, the most relied on, that there was a combustible substance, prepared and used as described in the specification, which would not answer the purpose, and this, if true, would be very important, for then the specification would be substantially untrue, and would deceive. The substance relied on was portfire, by the application of which to the priming of cannon it is well known that they were at one time very commonly discharged. But we think that there are two grounds on which we ought not to yield to this objection, in a case in which we see no reason to infer from the language used any fraudulent intention to mislead the public, or make it unnecessarily difficult to understand and apply the invention. It is obvious that gunpowder was the combustible chiefly relied on—the most efficacious, the most obvious and easily procurable article for the purpose; at the same time as, upon principle, similar combustibles, prepared as fireworks are, would also have the same effect, words are introduced by the patentee, which enable him to include them, for the double purpose of making it an infringement of the patent to use them during its existence, and of directing the attention of the public to them, after it had become public property.

Language thus used ought not to be astutely construed so as to overthrow a patent, and we have a right to require that the objector should at the trial make his point clear, and fairly call the attention of his opponent to it. This was not done, and we are at this moment left in doubt upon the evidence what the term portfire means; whether it is the whole instrument, including both the case and the combustible within, or whether it means the latter only; if the former, it is clearly out of the question; and it was certainly so understood by the plaintiffs, for they called an officer of artillery to speak of it, in order to put it at once out of the case by shewing that the portfire as used in that service was a totally different thing from the safety fuse, and therefore did not interfere with its claim to novelty.

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The counsel for the defendant then asked a question or two, from which the mode of preparing and of compounding the combustibles within the case was ascertained, and its effects in destroying the case as it burnt, and upon these the objection was afterwards raised. What the quantity of combustibles was in the portfire, whether it would have the same effect in destroying the case if introduced into it in the very small proportion which the gunpowder in the fuse bears to the cylinder containing it, and many other matters necessary to point and establish the objection, were entirely passed over. Upon an objection so raised it was proper indeed to take the opinion of the jury, but, if they thought it not established satisfactorily, we see no reason to disturb that conclusion; and this conclusion may be also sustained upon another ground. In one sense, undoubtedly, the port fire may be said to be used in discharging ordnance, because it ignites the priming or train which causes the powder in the chamber of the cannon to explode; but it may well be questioned whether the terms "discharging of ordnance," ought to be understood in that sense in this specification. The port fire so understood is no more than a convenient match; but the fuse is used to perform the operation of a train; a fuse in it being concealed, and the case unconsumed; it could not be used in the discharging of ordnance in the sense in which the portfire is used for that purpose, and the portfire, whether we mean by that term the whole instrument, case and combustible, or combustible only, has not been shewn to have been used, or to be fitted for the discharge of ordnance in any other sense.

Whether therefore we regard the imperfect manner in which this objection was presented, or its entire failure in fact, if the specification be understood in one, and that by no means an unreasonable, sense, we think that the jury were not unwarranted in their finding upon the fourth issue, and that this rule therefore must be discharged.

D.

The following rule was promulgated in Trinity Term last.

TRINITY TERM, 4th *Victoria*, 1841.

IT is ordered that where judgment is signed by virtue of a judge's certificate, given pursuant to the act 1 *Will.* 4, c. 7, s. 2, such judgment may be signed without any rule for judgment.

| | | |
|----------|------------------|------------------|
| (Signed) | DENMAN, | E. H. ALDERSON, |
| | N. C. TINDAL, | J. PATTESON, |
| | ABINGER, | J. GURNEY, |
| | J. PARKE, | J. WILLIAMS, |
| | J. B. BOSANQUET, | J. T. COLERIDGE. |

END OF SITTINGS AFTER MICHAELMAS TERM.

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2. *Illegality in obtaining Signatures to Certificate.*

2. The statute 6 *Geo. 4*, c. 16, s. 125, makes void a guarantee given by a third person to a creditor of a bankrupt as an inducement to sign his certificate.

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3. Indorsement of Note by Bankrupt after Bankruptcy.

3. In an action by the holder of a promissory note, indorsed generally by the payee, to a plea that the payee indorsed it after he became bankrupt, the plaintiff replied that he bonâ fide took and received the note before the payee became bankrupt, without any notice of any act of bankruptcy, and not by way of fraudulent preference. It appearing that the payee indorsed the note in blank before he became bankrupt, to a person who delivered it after the bankruptcy to the plaintiff: — *Held*, that the defendant was entitled to the verdict on the issue. *Green v. Steer.* 499

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ously with another man, unless some evidence is also given of the non-access of the husband.

A woman married in 1812 went through the form of marriage in 1818, living her husband, and cohabited with her paramour down to 1832: — *Held*, that the Quarter Sessions in 1840, when her husband was still living, were not justified in finding, upon these facts alone, there being no evidence as to non-access, that her child, who was then nineteen years of age, was a bastard. *Reg. v. Mansfield.* 7

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1. Consideration—Indorsement in Blank.

1. Declaration by indorsee against the acceptor of a bill of exchange, drawn by *R.*, indorsed to *M.*, and by *M.* indorsed to the plaintiff. Plea: that there was no consideration for the drawing or accepting of the bill, or for the indorsements. Replication: that the indorsement by *M.* was in blank, and that, after such indorsement, *X.*, who then appeared to be, and whom plaintiff believed to be, the lawful holder of the bill, delivered it to plaintiff for value and without notice: — *Held*, on special demurrer, that the replication was not a departure, and was good in confession and avoidance of the plea.

Semle, that the plea was bad on special demurrer for not alleging that plaintiff gave no consideration for the bill. *Arboux v. Anderson.* 403

2. *Consideration.*

2. To a declaration by the indorsee of a bill of exchange, drawn by K., and accepted by the defendants, they pleaded that K. was a trader in Ireland, accustomed to consign goods to them by carrier, as his commission agents at Liverpool, and that the usual course of business was as follows: K. on consigning goods from time to time, took a receipt bill of lading for the goods signed by the carrier, and obtained advances of money from the plaintiff, on indorsing to him the bill of lading, and also a bill of exchange, drawn by K. upon the defendants, for the amount of such goods; the plaintiff then remitted the bill of exchange to the defendants for acceptance, and also the bill of lading, indorsed by himself, and thereupon the defendants on the faith of the bill of lading, and in consideration of such security on the goods, were accustomed to accept such bill of exchange. That at the time of the drawing and indorsing by K., to the plaintiff, of the bill of exchange in question, K. indorsed to the plaintiff a bill of lading, the carrier's signature to which was forged, well knowing the same &c. and on the faith thereof obtained the usual advance, to wit, the amount of the bill of exchange; that the defendants, on the remittance to them by the plaintiff of the forged bill of lading, indorsed by him, and of the bill of exchange, accepted the latter, at his request, without notice &c., and so the consideration for their acceptance wholly failed.

Held, that as the plaintiff was indorsee of the bill of exchange for value, and it was not averred that he obtained the acceptance by any fraudulent representation, or that he knew the bill of lading to be forged, the failure of considera-

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3. *Notice of Dishonour.*

3. In an action by indorsee against the drawer of a bill of exchange, proof that plaintiff, on the day on which he himself received notice of dishonour from the holder, wrote and sent a letter to defendant, and proof of notice to produce that letter as containing notice of dishonour, and that defendant, when applied to by plaintiff for payment of the bill, objected that it had not been presented to the acceptors in due time, but did not object that he had not had notice of dishonour, are, on default to produce the letter, evidence that it contained a regular notice of dishonour. *Curlewis v. Corfield.* 489

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3. Under 9 *Geo.* 4, c. 61, s. 27, an appeal lies to the quarter sessions of the county against the refusal of borough justices to grant a licence to sell beer, &c., although the borough has a charter with a ne in-tromittant clause, and has also separate quarter sessions under 5 & 6 *Will.* 4, c. 76, s. 103. *Reg. v. Deane* 292

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II. *Compensation to borough Officers.*

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1. If a corporation refuse compensation to a removed corporate officer, on the ground that they had removed him for cause sufficient, the Lords of the Treasury have no jurisdiction to try the question of the sufficiency, and though after entertaining that question, and determining it in favour of the claimant, they also adjudicate upon the proper amount of compensation, this Court will not enforce, by mandamus, the payment of such compensation, nor try, upon the return to a writ of mandamus, the sufficiency

of the cause, the claimant being bound in the first instance to proceed against the corporation by mandamus, to compel them to restore him or give him compensation for removal.

Semble, that to justify the removal of a corporate officer, there must be misconduct specially in the execution of his office, and that misconduct in duties which he has performed for the corporation, but which are not necessarily any part of his official duty, is not sufficient. *Reg. v. The Mayor, &c. of Newbury.* 388

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BURGESS.

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In case for an injury to the plaintiff's reversionary interest by the defendant's obstruction of a watercourse on his land and thereby sending water upon and under the house and land in the occupation of the plaintiff's tenant, the defendant pleaded, that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land, that in consequence it fell into the watercourse, and caused the damage, and that within a reasonable time after the defendant had notice he removed it:—*Held*, to be a bad plea, it not shewing any obligation on the tenant to repair the wall merely as terre-tenant. *Quare*, whether it would have been good if it had. *Bell v. Twentyman.* 223

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2. *Indictment removed—Liability of Bail for Costs.*

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3. *Who entitled to Costs, where Indictment removed.*

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CHARTER-PARTY.

Plaintiffs, owners of a ship, agreed by charter-party that the ship should have eighty-five running days for loading and unloading her cargo, and that the freighter might keep her on demurrage for fourteen additional running days, at a stipulated rate per diem. The ship arrived in port with five running days due to her. On her arrival and subsequently, on another occasion, the plaintiffs refused to permit her to be unloaded. Afterwards, but not till after the expi-

ration of the running days, she was permitted to unload, but the cargo was not discharged until after the expiration of fourteen days beyond the running days. In *assumpsit* against the freighter on the charter-party, the declaration charged a detention on demurrage for fourteen days, and a general detention beyond.

Pleas, 1. non-assumpsit; 2. that he did not keep or detain the ship *modo et formâ*; 3. that, at the time she was unloading, the plaintiffs wrongfully stopped the unloading, and prevented the defendants from unloading. The jury found that the plaintiffs' refusal was wrongful.

Held, on motion for a new trial and for judgment non obstante veredicto, on the third plea:—

1. That the plea denying the detention of the ship was sufficiently made out by the finding of the jury, and that the plaintiffs could not, under this declaration on the charter-party, recover for the use of ship during so much of the actual unloading as exceeded five days.

2. But that the third plea was bad; as such an interference by the plaintiffs to prevent an unloading, as was stated in the general terms of the allegations in that plea, would not put an end to the obligation of the charter-party. *Benson v. Blunt.* 449

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Pew, faculty for, to a corporation. See PROHIBITION.

CLERGYMAN.

A declaration in case against a clergyman for not solemnising a marriage, stated that the *plaintiff and Mary*, at the time of the grievance, &c. were desirous to intermarry; that a licence was obtained, authorising (in the usual form) the solemnisation of the marriage, at any time within three months from the date, between 8 and 12 A.M., and reciting that *Mary* had resided at B. for fifteen days next before the date; that the defendant was minister of the church of B.; that by reason of the premises, and by force of the licence, it became the duty of the defendant to solemnise the marriage in the manner and time specified in the licence, when thereunto requested; that the defendant had notice of the licence, and was requested by the plaintiff to solemnise the marriage in the manner and time specified in the said licence, yet the defendant *wrongfully* and illegally refused.

Held, after verdict for the plaintiff, that the declaration was bad, as the request by the plaintiff alone did not shew notice to the defendant that *Mary* was willing to be then married.

Semble, per *Patteson* and *Cole-ridge* Js., the declaration was also bad for not alleging the request to have been made within three months from the date of the licence.

Semble, per *Williams* J., that the duty to solemnise the marriage, in the manner and time specified in the licence, was not well laid, as

the defendant would be entitled to previous notice.

Quære, whether such an action is maintainable at all? *Davis v. Black.* 432

COLLISION.

As to amount of costs which Admiralty may award in cases of collision. See ADMIRALTY.

COMMON, RIGHT OF.

See CORPORATION, 2.

COMPENSATION.

To borough Officer.

See II. BOROUGH, 1—MANDAMUS, 2.

To owners of lands, by Railway Company. See RAILWAY, 2.

CONDITION.

Pleading alteration in the condition of a bond. See ALTERATION.

Proviso for redemption in a mortgage deed, whether a condition within the Mortmain Act. See MORTMAIN.

CONSIDERATION.

Onus of proving consideration of bill of exchange. See EVIDENCE, 1.

Pleading want of consideration. See BILL OF EXCHANGE, 1.

CONSTABLE.

In an action for false imprisonment the plea stated that the plaintiff committed a breach of the peace by violently knocking for a long time at the door of defendant's dwelling-house, and that the plaintiff threatened to continue such knocking until a certain book was delivered up to him; that the defendant then sent for a constable, and, the plaintiff having ascertained

this, ceased knocking and ran off, when the defendant, with the assistance of the constable, immediately pursued the plaintiff and overtook him near the dwelling-house, whereupon the defendant, in order to preserve the peace and prevent the plaintiff from continuing the disturbance, gave him in charge to the constable, &c. &c. — *Held*, that the plea was bad, non obst. vered., as it did not shew either that the breach of the peace was continuing, or shew any certain facts from which a renewal of the breach was to be apprehended. *Baynes v. Brewster.* 669

CONSTRUCTION.

See DEVISE.

CONTRACT.

See BANKRUPT, 1—CREDIT—EVIDENCE, 3—LEASE—VENDOR and VENDEE.

CONVICTION.

See VAGRANT.

Whether or not a justice of the peace may draw up a corrected record of a summary conviction after he has returned one record of it to the quarter sessions, he cannot do so in a case where the first conviction has been brought up by certiorari and quashed. Where a prisoner has been brought up by a writ of habeas corpus and discharged, on the ground of the insufficiency of the conviction as appearing by the recital in the warrant of commitment, the conviction itself not having been brought up by the crown, and the certiorari having been taken away from the prisoner by statute, such proceeding is equivalent to a quashing of the first conviction, and a justice of the peace cannot afterwards draw up another formal one.

A conviction under the 70th section of the Pilot Act, 6 Geo. 4, c. 125, for "*continuing*" in charge of a ship after a duly licensed pilot had offered to take charge of it, is bad, if it do not shew that the offer was made to or in the presence of the party in charge of the vessel, or that it otherwise came to his knowledge. It ought also to appear in the conviction that the defendant was the person in charge of the vessel when the offer was made; and *semble*, that this does not sufficiently appear from an allegation that he "*continued*" in charge of it after the offer.

Though the consent of the Warden of the Cinque Ports or of the Trinity House Corporation respectively is required before proceeding to recover penalties under the Pilot Act, it is not necessary that such consent should appear in the conviction, which is sufficient in that respect if it follow the form given by that statute. *Chaney v. Payne*. 348

COPYHOLD.

See *HERRIOT*.

1. *Licence to demise*.

1. A lessee for years of a copyholder may maintain ejectment, though there be no custom in the manor to lease, and no licence has been obtained from the lord, such lease being good between the parties to it, and void only as against the lord. *Doe d. Tressidder v. Tressidder*. 70

2. *Dower*.

2. By the custom of the manor of Cheltenham, as settled by 1 Car. 1, the widow of a copyholder is entitled to dower out of all the customary lands of which her husband was tenant during the coverture, although he did not die tenant, such lands having been aliened

during the coverture by the husband alone, without the wife having been examined in Court, or having joined in the surrender.

Where such lands, between the time of alienation by the husband and of his death, have been improved in value by buildings, the widow is entitled to dower, according to their value at the time of his death, although one-third remain not built upon. And if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each such possessor. *Doe v. Gwinnell*. 180

CORONER.

See *DRODAND—INQUISITION*.

CORPORATION.

See *BOROUGH*.

As to election of alderman. See *ALDERMAN*.

As to right to have name inserted on the burgess roll. See *BURGESS*.

Attachment against corporation. See *MANDAMUS*, 2.

Faculty for a pew to corporation. See *PROHIBITION*.

Ejectment against corporation, *elegit*, consent rule. See *EJECTMENT*, 1.

Corporation property, how to be described. See *INQUISITION*.

1. *Indictment against*.

1. A rule to quash an indictment for misdemeanor against a corporation aggregate in their corporate name, on the ground that such an indictment does not lie, was discharged, the Court expressing no opinion on the question, but leaving the defendants to take the objection on demurrer, with liberty to plead over in case of a decision against

them. *Reg. v. The Birmingham and Gloucester Railway Company.*

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2. Right of Common.

2. In case for disturbance of a right of common, the declaration alleged that the mayor, aldermen and burgesses of the town and borough of Stamford had the right in question for every resident freeman paying scot and lot. It appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford.

Held, that the declaration was not supported, as the right claimed was larger than that proved.—*Beadsworth v. Torkington.* 482

CORPSE.

Lien of gaoler on corpse of prisoner.
See GAOLER.

COSTS.

See ADMIRALTY—BOROUGH, 4—CERTIORARI, 2, 3—EJECTMENT, 2, 3—HIGHWAY, 6—MANDAMUS, 3, 4.

1. Where several Counts.

1. *Scmble*, where on summons to strike out one of several counts, as founded on the same subject-matter of complaint, the judge, being satisfied, on cause shown by the plaintiff, allows both counts, on the ground that it is intended to establish a distinct matter of complaint under each, and the plaintiff succeeds at the trial on an issue arising out of one only of the counts so allowed, if the judge at nisi prius certifies, under Reg. Gen. Hil. 4 Will. 4, c. 7, that it was not bonâ fide intended to establish distinct matter of complaint on the several counts, the certificate will

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deprive the plaintiff of all the costs of the cause.

Held, where there are three counts, and on summons to strike out the 1st or 2d, they are allowed to stand, on the ground of plaintiff's intention to establish a distinct complaint under each, if the plaintiff at the trial succeeds on the 2nd and fails on the 1st and 3rd, a certificate, under rule 7, that he did not intend to establish a distinct matter of complaint "in respect of *either* of the counts on which he has *failed*," is inoperative, because it does not apply to the two counts in respect of which the summons was taken out.

After trial and judge's certificate it is too late to object to an order, allowing two counts, that it was improperly made, because the counts were not in apparent violation of rule 5. *Dewar and another v. Swabey and another.* 397

2. Power of Court to make real Plaintiff pay Costs.

2. The Court has no power after a judgment for the defendant in a personal action to make a third party pay the costs on the ground that he was the real plaintiff. *Evans v. Rees.* 579

COUNTY.

Appeal to county sessions against orders of removal by borough justices, or a refusal by them to grant a beer licence. See BOROUGH, 1, 2, 3.

COURT.

Inferior Court, jurisdiction of this Court over, even where certiorari taken away. See CERTIORARI, 1. Actions against officers of. See TRESPASS, 1, 2.

COVENANT.

See EJECTION, and LANDLORD AND TENANT, 3.

CREDIT.

On a contract for the sale of a specific chattel on credit, time, without express stipulation, is not of the essence of the contract; and the vendee, on tender of the price, though after the expiration of the period of credit, may maintain trover against the vendor to recover such chattel. The vendor cannot rescind the contract on non-payment at the day. *Martindale v. Smith.* 1

CRIMINAL INFORMATION.

One of several applicants for a criminal information against the publisher of a newspaper libel had addressed "To the Editor," a recriminatory letter bearing date the 26th December and signed by him on his own and their behalf. The letter, which was of such a character as to disentitle the writer to a rule for a criminal information, if he had been the sole applicant, was published in another newspaper of the 5th January following: —*Held*, that the other applicants were bound to have prevented the publication, or to show that they had no opportunity of preventing it, and that it was not enough for them to state they were not parties to it and did not know of it until some time after its date, it appearing that a copy of the letter had been sent to each of them, and their affidavits not stating when they received such copy, or that they did not know of the letter before publication. *Reg. v. Lawson.* 15

CUSTOM.

Customary dower. See **COPYHOLD**, 2.

DAMAGE.

Right of action against sheriff for not executing habere facias possessionem. See **EJECTMENT**, 3.

Against clergymen for not solemnising a marriage. See **CLERGYMAN**.

DAMAGES.

Authority of judge to enter damages on the postea though not found by the jury. See **MANDAMUS**, 3.

Right to recover damages on mandamus. See **MANDAMUS**, 3.

Consequential damages for nonrepair. See **LANDLORD AND TENANT**, 3.

Damages, assessment of, after judgment for plaintiff on demurrer in action on bill of exchange. See **EVIDENCE**, 4.

DAMNUM.

Right of action against sheriff for not executing habere facias possessionem. See **EJECTMENT**, 3.

Against clergymen for not solemnising a marriage. See **CLERGYMAN**.

DEATH.

See **REPLEVIN**.

Death of plaintiff in replevin, after re. fa. lo. no breach of replevin bond. *Morris v. Matthews.* 677

DEBT.

Amendment of ca. sa. on promises where action in debt. See **AMENDMENT**.

Debt will lie for use and occupation, though there be an express demise, if it be not by deed. *Gibson v. Kirk.* 252

DEBTOR.

Lien of gaoler on corpse of his debtor dying in prison. See **GAOLER**.

DEED.

Inrolment of, under Mortmain Act. See **MORTMAIN**.

Stamp on, when executed under power of attorney. See **STAMP**.

DEFAMATION.

See **CRIMINAL INFORMATION**.

DEMURRAGE.

See **CHARTER-PARTY**.

DEMURRER.

Assessment of damages, after judgment on. See **EVIDENCE**, 4.

When declaration may be objected to on demurrer to plea to the jurisdiction. See **II. PLEADING**, 1.

DEODAND.

A deodand cannot be imposed by a coroner's jury upon the instrument of death, where they find the homicide to have been felonious. *Reg. v. Polwart.* 211

DEVISE.

Devise of lands and all testator's estate, right, title, &c. therein, to trustees, "their heirs and assigns for ever," upon trust, and to the intent that *A.* should hold to him and his assigns for life, subject to the payment of an annuity, and to the further intent that he should cut as much timber as should be necessary for the use of the farm; and after *A.*'s death then to the use and behoof of the trustees "and their assigns in trust," and I give the same unto *B.*, his heirs and assigns for ever, and, for want of issue, to the use and behoof of my trustees and their assigns, in trust to preserve the uses &c. from being defeated; and for want of such issue to *C.* his heirs and assigns for ever, and furthermore upon this trust, and the further intent that my trustees, their heirs or assigns, by mortgage or demise of my real estate, or from the rents,

or by such other ways as they shall think fit, raise 80*l.* for payment of my debts:—*Held*, that the trustees took the legal estate in fee. *Doe d. Davies v. Davies.* 33

DISPENSATION.

See **VENDOR AND VENDEE**.

DISTRESS.

Whether property passes by sale under defective distress warrant. See **HIGHWAY**, 6.

Distress on Fixtures. See **FIXTURES**.

DOWER.

By custom of Cheltenham. See **COPYHOLD**, 2.

EASEMENT.

See **WAY**.

EJECTMENT.

Ejectment by lessee of copyhold, where no licence to demise. See **COPYHOLD**, 1.

Ejectment to recover railway. See **RAILWAY**, 1.

1. *Consent Rule.*

The Court will not let in a corporation to defend an ejectment without entering into the usual consent rule to admit possession, on the ground, whether well or ill founded, that the land of a corporation cannot be taken in ejectment on a writ of *elegit* upon a judgment against the corporation for debts contracted since the passing of the Municipal Corporation Act.

It is too late in Hilary term to seek to set aside for irregularity of service a declaration in ejectment served in the July previous, and a rule for judgment obtained in Michaelmas term, the defendant having in the vacation following applied by summons for time

to appear and plead. *Doe v. Roe.* 220

2. *Death of Lessor—Costs.*

If pending a rule for a new trial in ejectment the lessor of the plaintiff dies, the defendant is not entitled to have security for costs before the rule is argued. *Doe v. Cozens.* 503

3. *Habere facias possessionem.*

Judgment had been signed for the plaintiff in an action of ejectment. The lessor caused to be issued and delivered to the sheriff a writ of habere facias. He then made an appointment with the sheriff for the purpose of executing the writ. The sheriff having been informed, by the defendant's attorney, that the proceedings were irregular, and would be set aside, did not execute the writ. The judgment was afterwards set aside, on an affidavit of merits:—*Held*, that the lessor of the plaintiff was entitled to recover, in an action on the case against the sheriff, the costs he had incurred in preparing to assist the sheriff to execute the writ. *Mason v. Paynter.* 381

ELECTION.

See ALDERMAN.

ELEGIT.

Against corporation property. See EJECTMENT, 1.

ESTATE.

See DEVISE—LANDLORD AND TENANT, 5—MORTGAGOR—VI. POOR, 1.

EVICITION.

In covenant by landlord against tenant, on a farming lease, assigning breaches on the defendant's cove-

nants: 1. to repair; 2. not to plough meadow land; 3. or depasture orchards; 4. or cut, lop, or injure trees, woods, or plantations, &c.; 5. or assign or underlet the demised premises, or any part thereof, without the plaintiff's consent in writing; the defendant pleaded that before any of the breaches assigned he was evicted and kept out of part of the demised premises by the authority of the plaintiff:—*Held*, that the plea afforded no defence to the action. *Newton v. Allin.* 44

EVIDENCE.

Under particular issues. See BANKRUPT, 2, 3—BILL OF EXCHANGE, 3—II. PLEADING, 4, 5—SHERIFF, 2.

Evidence generally. See PARTICULARS OF DEMAND, 3—III. POOR, 3, 4, 5; IV. 3, 4; V. 4.

Of right of common in freemen. See CORPORATION, 2.

Of conversion. See ABUTTALS—HERIOT—STAMP—TENDER.

1. *Onus probandi.*

Assumpsit against the drawer of a check. Plea, that it was drawn and delivered to a third person to secure a gaming debt, and by him delivered to the plaintiff without consideration. Replication, that it was delivered to the plaintiff for a good consideration. Issue thereon:—*Held*, that the illegal drawing of the check was so admitted on these pleadings, as to throw on the plaintiff the onus of proving the consideration. *Bingham v. Stanley.* 237

2. *Privilege of Witness.*

An attorney, although he has received a document from his client, is not privileged from answering a question, put for the purpose of letting in secondary evidence, whether the document is in his possession. *Coates v. Birch.* 647

3. *Parol Evidence.*

A sold-note expressed, "eighteen pockets of hops at 100s."—*Held*, that parol evidence was admissible to shew that the 100s. meant the price per cwt. *Spicer v. Cooper.*

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4. *Evidence on Writ of Inquiry.*

Where a plaintiff, in an action on a bill of exchange, has obtained judgment on demurrer, he is entitled, at the assessment of damages on the demurrer, to the full amount of the bill, without producing it in evidence. *Lanc v. Mullins.*

712

5. *Entries of deceased Steward.*

Entries, in the account book of a deceased steward, of the receipt of money by the steward, in the handwriting of his clerk, is evidence of such receipt, although the clerk who made the entries is alive and not called as a witness, where it appears that the steward adopted such entries by presenting them to be audited. *Doe d. Graham v. Hawkins.*

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EXECUTION.

By ca. sa. See AMENDMENT—BANKRUPT, 1—BARRISTER.

By fi. fa. See SHERIFF.

By habere facias possessionem. See EJECTMENT, 3.

By elegit. See EJECTMENT, 1.

FACULTY.

For a pew to corporation.—See PROHIBITION.

FALSE RETURN.

See SHERIFF, 2.

FIXTURES.

Fixtures cannot be distrained for rent. *Darby v. Harris.*

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FORFEITURE.

Leasing copyhold without license.—See COPYHOLD, 1.

FREEMEN.

Mode of alleging right of common in freemen of boroughs.—See CORPORATION, 2.

GAMING.

Admission in pleading that bill given for a gaming transaction.—See EVIDENCE, 1—HORSE RACE.

In an action against the marshal, for the escape of a prisoner in custody under an execution on a judgment obtained adversely against him, it is no defence that the judgment was to recover the amount of a bill of exchange, given for money lost at play, the statutes 10 Car. 2 and 9 Ann. not including judgments obtained adversely, but those only given to secure money lost at play. *Chapman v. Lane*

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GAOLER.

The Court on motion directed a mandamus to go peremptorily in the first instance, commanding a gaoler to give up for burial the body of a debtor dead within the gaol, it being sworn that he refused to do so until a certain sum he claimed, as a debt owing by the deceased for maintenance, were paid. *In re the Bailiff of Wakefield.*

566

GUARANTIE.

See BANKRUPT, 1, 2.

HABEAS CORPUS.

See CONVICTION.

HABERE FACIAS POSSESSIONEM.

Action against sheriff for not executing. See EJECTMENT, 3.

HEDGES.

Order of justices to cut. See HIGHWAY, 4.

Mandamus to turnpike road trustees to make. See HIGHWAY, 5.

HERIOT.

Where a customary heriot of the best beast is due, on the death of a tenant, to the lord of the manor, no property in any specified beast vests in the lord before selection by him of the beast.

A selection of seven beasts as heriots, when the lord is entitled to five only, will not be sufficient to vest in the lord the property in any five of them.

Quere, whether in trover, if seven things are demanded when there is a right to five only of them, a general refusal is evidence of a conversion of such five.
Abington v. Lipscombe 230

HIGHWAY.

Appeal against the accounts of the surveyor of the highways. See RAILWAY COMPANY—SURVEYOR.

1. *Customary Liability of Township to repair.*

An indictment charging a township with a customary liability to repair all roads within the township, and not limiting the liability to such roads as but for the custom would have been repairable by the parish—*Held* good (on motion in arrest of judgment), on the ground that there might be such a custom as alleged, and that, if there were any roads repairable *ratione tenuræ* or otherwise, it was for the defendants to shew it as a matter of evidence. *Reg. v. Heage* 548

2. *Certificate of Justices for Diversion.*

A footpath led from the hamlet of Wyke to a turnpike road which led in one direction to the town of

Axminster, and in the other to various other places. It was proposed to divert a part of this footpath, by making it join the road at a point somewhat nearer to Axminster.

Two justices certified (under the 5 & 6 *Will.* 4, c. 50, s. 85) for the diversion of this footpath, described as leading "from W. to A.," and stated in their certificate that the intended footpath was "nearer and more commodious" than the old.

Against this diversion an appeal was tried at the quarter sessions, under sect. 88, and the grounds of appeal were, that "reference being had to the various places with which the original footpath communicated, the new line was not nearer and more commodious than the old."

It appeared that the proposed new line of footpath joined the turnpike road at a point nearer to Axminster than the old, and was consequently nearer as between Wyke and Axminster only, but that it was not so near as between Wyke and the other places mentioned.

Held, 1, That the jury were properly directed to construe the word "nearer" not as between W. and A., but as between the point at which the new and old lines of footpath diverged, and the point where the old line reached the road.

2. That the jury having found that the new path was *not* nearer than the old, but that it *was* more commodious, the order for diverting the footpath could not be made, as it was necessary, under section 89, that the substituted line should be both "nearer" and more "commodious." *Reg. v. Shiles.* 304

3. *Private Street—Paving Commissioners.*

Ely Place, part of the liberty of Saf-

from Hill, Hatton Garden, and Ely Rents, is private property, and though it is generally open to the public during the day, has never been dedicated to the public:—*Held*, that the commissioners for paving Saffron Hill, Hatton Garden, and Ely Rents had no authority to enter for the purpose of paving it, under 5 *W.* 4, c. xviii. s. 44, which empowers them at all times to pave, &c. all the squares, streets, lanes, courts, ways, footways, or carriage-ways, passages and places within the liberty. *Paul v. James.* 316

4. *Order of Justices to cut Fences.*

By 5 & 6 *Will.* 4, c. 50, s. 65, "if the surveyor shall think a carriageway or cartway, &c. prejudiced by the shade of any hedges, and that the sun and wind are excluded from such highway, or if any obstruction is caused in any carriageway or cartway by any hedge or tree, it shall be lawful for one justice, &c." to summon the owner of the hedges at a special sessions, "to shew cause why the said hedges are not cut, &c. in such manner that the carriageway, &c. shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriageway, &c. to the damage thereof, or why the obstruction caused in such carriageway, &c. should not be removed, &c. and if such justices shall order that such hedges shall be cut, &c. in manner aforesaid, or such obstruction removed," and the owner shall not comply within ten days, he may be convicted and fined, and the surveyor may himself cut the hedges.

In trespass for cutting the plaintiff's hedge, a surveyor justified under the act, because the plaintiff had failed to comply with an order, reciting that the plaintiff had neglected to cut his hedge, "whereby

the sun and wind were excluded from the carriageway, &c. to the damage thereof, and whereby also obstructions were caused therein," and ordering him to cause the said hedges to be cut, and the said obstruction to the damage of the said highway to be removed, &c.

Held, that the order was bad in substance, and did not justify the surveyor; because it required the plaintiff to cut his hedge generally, without specifying the manner in which it was to be done. *Brook v. Jenney.* 567

5. *Fences to be made by Trustees of Turnpike Road.*

Where the trustees of a turnpike road have formed a new road through private grounds, but have neglected to make proper fences, as required by stat. 4 *Geo.* 4, c. 95, s. 66, the want of the necessary funds for that purpose is not a sufficient answer to a mandamus commanding them to make the fences. *Reg. v. The Trustees of the Luton Roads.* 248

6. *Costs on Appeal under 5 & 6 Will.* 4, c. 50, s. 90.

The quarter sessions have no power to make a general order for the costs of an appeal, though they may refer the taxation of the amount to their officers, provided they during the sessions adopt his decision, and incorporate it in the order. This rule is equally applicable, whether the sessions have a discretion to award costs or not.

The nonpayment of costs awarded by an order of the quarter sessions, on the trial of an appeal against the stoppage of a highway under the stat. 5 & 6 *Will.* 4, c. 50, s. 90, is not an offence forming a subject for a conviction under the 101st and 103rd sections of that statute, but the nonpayment of them may be enforced by a distress warrant, issued by two justices under the

103rd section, grounded directly on the order of sessions.

Such a distress warrant is bad, if it do not shew on the face of it an order of sessions for the payment of a specific sum as costs.

Quære, whether any property passes to a purchaser by a sale under a distress warrant so defective. *Sellwood v. Mount*, and *Lock v. Sellwood*, n. 358

HORSE-RACE.

A wager of 50*l.* to 1*l.* that a certain horse had not won a by-gone horse-race is lawful. *Pugh v. Jenkins*. 40

HUSBAND AND WIFE.

Dower by the custom of Cheltenham. See *COPYHOLD*, 2.

Evidence of non-access. See *BASTARDY—VAGRANT*.

ILLEGALITY.

See *BANKRUPT*, 2—*HORSE RACE*.

Must be pleaded. *Fenwick v. Laycock*, 27.

ILLEGITIMACY.

See *BASTARDY*.

INDICTMENT.

Against CORPORATION, 1.

Mandamus, although indictment lies.

See *MANDAMUS*, 1.

Form of, against township for non-repair of road. See *HIGHWAY*, 1.

Costs of, when removed by certiorari.—See *CERTIORARI*, 2 and 3.

INFERIOR COURT.

See *CERTIORARI*, 1—*TRESPASS*.

INFORMATION.

See *CRIMINAL INFORMATION*.

As to quo warranto.—See *ALDERMAN*.

Before justice.—See *JUSTICE*.

INJURIA.

See *CASE—CLERGYMAN—EJECTMENT*, 3—*LANDLORD AND TENANT*, 3.

INQUIRY.

Writ of, to assess damages on demurrer. See *EVIDENCE*, 4.

INQUISITION.

A coroner's inquisition, in which the things moving to the death were described as the property of the "Proprietors of the Hull and Selby Railway," was quashed, there being no corporation of that name or other similar name than "The Hull and Selby Railway Company." *Reg. v. West*. 481

INROLMENT.

Of deed. See *MORTMAIN*.

INSENSIBLE.

Ejectment was brought on the following proviso for re-entry in a lease, "that if the said lessee (the defendant), his executors, administrators, or assigns, shall either by their or his own act or acts, or by bankruptcy, insolvency, writ of extent, or of execution by fieri facias, or other act of law, or by any other means whereby either voluntarily or without his or their consent whereunder the said premises hereby demised or any part thereof would, in case that proviso did not exist, be liable to be seized by the sheriff, or any other person, or in case the said lessee, his executors, administrators, or assigns, shall at any time or times hereinafter make breach or default in performance of the covenants, or any of them, hereinbefore on his or their parts contained," then the lease was to be void, and the lessor to re-enter :

—*Held*, that the proviso was insensible. *Doe d. Wyndham v. Carew*. 640

INTEREST.

Bankrupt has sufficient interest in his goods to move to set aside a fi. fa. levied against good faith. *Pinches v. Harvey*. 236
Interest in question, how far it disqualifies justices at sessions. See *CERTIORARI*, 1.

INTERPLEADER.

Where seizure by the sheriff under a fi. fa. is disputed on the ground that the goods on which the levy has been made were held by the defendant, not in his own right, but merely as executor in trust for others, the defendant is to be considered as "not being the party against whom the process issued," and the sheriff may apply for an interpleader rule under 1 & 2 *Will.* 4, c. 58, s. 6. *Fenwick v. Laycock*. 532

JUDGE.

Probable cause for the judge. See *PROBABLE CAUSE*.
Power of, to enter damages on the postea, where none found by the jury. See *MANDAMUS*, 3.

JUDGMENT.

Rule of Court, Trinity Term.

Where judgment is signed by virtue of a judge's certificate, given pursuant to the act 1 *Will.* 4, c. 7, s. 2, such judgment may be signed without any rule for judgment. 741
Execution of judgment not duly revived by sci. fa. See *ARREST*.
Judgment in debt and ca. sa. on promises. See *AMENDMENT*.
How far a defence in an action for escape, that the prisoner was taken

in execution of a judgment for a gaming debt. See *GAMING*.
Judgment of inferior court quashed, notwithstanding statute taking away certiorari. See *CERTIORARI*, 1.

JURISDICTION.

See *ADMIRALTY*, as to costs in collision cases.
See *BOROUGH*, 1, 2, 3, 4, as to borough sessions.
See *CERTIORARI*, 1, as to jurisdiction of this Court, notwithstanding statute taking away certiorari.
See *COSTS*, 2, as to power of the Court to make third party pay costs.
See *JUSTICE*, as to warrant of apprehension.
See *OVERSEERS*, as to appeal against their accounts.
See *OXFORD*, as to power of discommuning.
See *POOR*, VIII. 1, 2, as to power of quarter sessions in bastardy cases.
See *SURVEYORS*, as to appeal against their accounts.

JURY.

Probable cause for the judge. See *PROBABLE CAUSE*.
Sufficiency of specification for the jury. See *PATENT*.
Where jury have not found damages, entry of by judge. See *MANDAMUS*, 3.

JUSTICE.

Interest of justices, how far it disqualifies them from acting. See *CERTIORARI*, 1.
A warrant of apprehension was issued by a justice of peace, which did not recite any information on oath, and it appeared, in point of fact, the information was not sworn in his presence:—*Held*, that he was liable in trespass.

Quære. Whether a warrant is not totally void, which does not recite any information, and which directs an apprehension "to answer all such matters and things as in her Majesty's behalf shall be objected against him by *A. B.* for an assault committed on, &c. *Caudle v. Seymour.* 454

LANDLORD AND TENANT.

Distress on fixtures. See **FIXTURES**.
Liability of sheriff for not paying year's rent, on execution. See **SHERIFF**, 1.

Lease of copyhold without licence. See **COPYHOLD**, 1.

See also **DEBT FOR USE AND OCCUPATION—EVICTION—LEASE—WAY**.

1. *Use and Occupation.*

1. An upper floor of a house was occupied at a rent payable quarterly. During the currency of a quarter the house was burnt and rendered uninhabitable. In an action for use and occupation, the plaintiff having recovered for the occupation up to the time of the fire from the quarter-day preceding:—*Held*, that he was entitled to recover for that period at least. *Packer v. Gibbins.* 10

2. *Disputing Lessor's Title.*

2. The defendant demised premises to the plaintiff, who paid rent regularly for them for some years to the defendant; disputes having arisen between the defendant and a third party as to the rightful ownership of the demised premises, it was agreed to abide by a case to be submitted to a barrister, who gave his opinion in favour of the third party, whereupon the plaintiff being informed of the decision paid his rent to the third party. The defendant distrained for rent due after the decision, and the plaintiff pleaded the facts above

stated:—*Held*, that it was a question for the jury, whether the defendant by his acts had not admitted that his title was at an end, and consequently had no right to distrain. *Downs v. Cooper.* 573

3. *Repairs.*

3. A covenant by a lessor to repair the external parts of the demised messuage comprises the boundary walls of it, though they adjoin other buildings. At all events the lessor is liable under it to compensate the lessee for the damage arising from non-repair of such a wall, which arises after the adjoining building has been pulled down, though the damage be a consequence of such pulling down, he having made no attempt to prevent the damage arising from the further sinking of the wall, and though the adjoining building was pulled down in execution of powers given by an act of parliament, which contained a clause for the compensation of persons sustaining damage by the exercise of them.

Quære, Whether in such a case an action will lie against the lessor before a reasonable time has elapsed for the restoration of the wall by him, and *held* that, even if so, an action would be maintainable before such reasonable time had elapsed, he having, on application, contested his liability to do repairs, and given an unqualified refusal to do them.

In such an action, the lessee, after such refusal, having rebuilt an external wall, is entitled to recover the costs thereof, the jury having found that this was the proper mode of restoring it.

He may also recover the price of damage done to plate glass and fixtures in consequence of the sinking of the wall. But the lessee cannot recover the rent paid by him for the occupation of other

premises, during the progress of the repairs, though during that time the demised premises were not safely habitable. *Green v. Eales*. 468

4. Notice to quit

4. A house and appurtenances by a written demise were demised "for one year and six months certain from the date," at a yearly rent, "payable at the usual periods," with a proviso "that three calendar months' notice should be given on either side, previous to the determination of the said tenancy." The holding having continued beyond the term of the year and six months, *held*, that such holding was not a new tenancy, commencing at the end of that period, but a yearly tenancy commencing upon the original entry of the tenant, and therefore a notice to quit at the expiration of the second year of the holding was good. *Doe v. Dobell*. 218

5. By Mortgagor.

5. During the continuance of a tenancy from year to year the landlord mortgaged the premises, to secure the payment of an annuity. The mortgage deed contained a proviso that he should remain in receipt of the rents until sixty days after default made in payment of the annuity:—*Held*, as against the tenant, that before default the mortgagor had a sufficient interest in the premises remaining in him to entitle him to determine the tenancy by a notice to quit. *Doe d. Lyster v. Goldwin*. 463

LEASE.

Ejectment by lessee of copyholds where no licence to make that lease. See COPYHOLD, 1.

The following letters held to constitute an agreement only, and not a

demise from plaintiff to defendant:—

On 21st February, 1825, defendant wrote to plaintiff, "I shall be happy to take a lease of your iron ore at a royalty of 1s. per ton, and I will engage to work the several veins of ironstone, limestone, ore, and manganese, in such relative proportions as that the average produce of iron shall not exceed the usual average of the common ores (which I believe to be about 40 per cent.), the term to be 40 years from the 24th June next, and the sleeping rent 150*l.* per annum. The relative proportion of the iron ores in weight to be worked together to be ascertained by a competent person."

Plaintiff wrote to defendant in answer,—“I agree to the terms contained in your letter. I shall be ready to grant a lease conformable thereto.” *Jones v. Reynolds*. 62

LEGAL ESTATE.

See DEVISE.

LIBEL.

See CRIMINAL INFORMATION.

LICENCE.

Lease, without licence to lease. See COPYHOLD, 1.

Beer licence. See BOROUGH, 3.

LIEN.

Evidence of, under not possessed. See PLEADING, 5.

Lien of gaoler, on body of his debtor dying in prison. See GAOLER.

LUNATIC.

See VI. POOR, 1, and VII.

MALICIOUS PROSECUTION.

See PROBABLE CAUSE.

MALVERSATION.

See CERTIORARI, 1.

MANDAMUS.

See BIRTHS, as to mandamus to registrar of births to erase name.

See BOROUGH, II. as to compensation to officer.

See BURGESS, as to entering name on roll.

See GAOLER, as to detention of corpse by gaoler.

See HIGHWAY, 5, as to fences to be made on lands taken by turnpike trustees.

See NOTARY, as to admission of apprentice by Scriveners' Company.

See POOR, V. 2, 3.

See RAILWAY COMPANY, as to injury to roads and lands.

See SURVEYOR, as to appeal against surveyor's accounts.

1. *Mandamus, where another Remedy.*

1. The Bristol Dock Company were required to make and maintain a new channel, with equal depth and breadth at the bottom, and with equal inclination of the sides to the former channel. *Held*,

1. That a duty was cast upon the Company to repair generally the banks of the new course.

2. That mandamus would lie to compel the Company to repair, although there might be another remedy by indictment.

3. That to a mandamus, commanding the Company generally to repair the banks, it was not a good return, that they had maintained the channel with equal depth and breadth at the bottom, and with equal inclination of the sides to the old channel. *Reg. v. Bristol Dock Company.* 286

2. *Return to peremptory Mandamus—Attachment.*

2. A return, stating excuse for non-

compliance with a peremptory writ of mandamus, is inadmissible.

An attachment cannot be granted against the "mayor, aldermen and burgesses" of a borough for disobedience to a peremptory writ of mandamus requiring them to pay a sum of money secured by a compensation bond under the corporation seal, but the particular individuals who have been concerned in disobeying the writ must be named in the rule for the attachment.

A peremptory writ of mandamus, requiring a corporation to enforce payment of the existing borough rates, or to cause to be collected another rate, and out of the same to pay money due under a compensation bond, is bad, because it directs payment to be provided in a particular mode, by making or enforcing a borough rate, without shewing that the existing borough fund is insufficient; and the objection may be made, as an answer to a rule for an attachment against those who have disobeyed the writ. *Reg. v. Mayor, &c. of Poole.* 728

3. *Costs.*

3. On the trial of issues joined on a traverse of a return to a writ of mandamus, which commanded a scrutiny to be had of the poll at an election of parish officers, the jury found a verdict for the prosecutors, but there was no express finding of damages. The judge before whom the trial was, afterwards directed the verdict to be entered on the postea, with one shilling damages:—*Held*, that he had authority to do so, and that it was a proper case for the exercise of it.

The prosecutors in such a case are entitled to recover damages by force of the statutes 9 *Anne*, c. 20, s. 2, and 1 *Will.* 4, c. 21, s. 3,

though they have no private or particular interest apart from the general body of parishioners in the matter litigated.

The prosecutors are entitled to the costs of the proceedings as well of the writ as of the subsequent proceedings by the same statutes.

Quære, whether there being a return and traverse the Court have a discretionary power over the costs of the writ by the statute 1 *Will. 4*, c. 21, s. 6, or whether that section is confined to cases in which the writ of mandamus is refused, or issued and obeyed. *Reg. v. Fall.*

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4. Under the 9 *Ann.* c. 20, and 1 *Will. 4*, c. 21, the party, whether prosecutor or defendant, succeeding on an issue joined upon a traverse of a return to a mandamus, is entitled to the costs of the application for the writ as well as the costs of the subsequent proceedings without an express order of the Court.

Quære, whether the Court have a discretionary power on application made to disallow such preliminary costs, under 1 *Will. 4*.

A mandamus was directed to a commissioner under a drainage act (36 *Geo. 3*, c. 99), commanding him to swear into office a person claiming to have been appointed such commissioner. He returned that the claimant was not duly appointed; and obtained judgment upon issue joined on a traverse of such return.

By sect. 52 of the act, if judgment is given against the plaintiff in any action, suit or information commenced or prosecuted against any person for any thing done in pursuance of the act, such person is to have treble costs.

Held, that the judgment for the defendant in such proceeding by mandamus did not entitle him to treble costs, as neither his refusal

to swear in the claimant nor the making the return to the writ was a thing done in pursuance of the act. *Reg. v. Kell.* 127

MARRIAGE.

Action against clergyman for not solemnising marriage. See CLERGYMAN.

MERITS.

Order of removal discharged on the merits, when. See IV. Poor, 4.

MORTGAGOR AND MORTGAGEE.

1. Ejectment by mortgagee to recover railway. See RAILWAY, 1.
2. Notice to quit by mortgagor. See LANDLORD AND TENANT, 5.
3. Mortgage, whether within Mortmain Act. See MORTMAIN.
4. A tenant for years of a house demised it, by indenture of mortgage, dated March 24th, to the mortgagee, to hold thenceforth for the residue of the term (less one day), subject to the proviso thereafter mentioned; and he also sold and transferred the fixtures and chattels therein to the mortgagee, to hold for his own use and benefit, but subject to the proviso thereafter contained. The deed contained a proviso for reconveyance, on payment of the mortgage money, on the 24th June then next, and also a proviso that on non-payment on that day, it should be lawful for the mortgagee to enter upon, and receive and take the rents and profits of the said leasehold and other premises, and, if he should think proper, of his sole authority, to sell or underlet the premises, and to sell the fixtures and chattels.

Held, that the mortgagee's right to take possession did not attach until the 24th June, and that he could not maintain trespass for an

entry, or for an asportavit of the fixtures and chattels before that day by a stranger. *Wheeler v. Montefiore*. 493

MORTMAIN.

Quære, whether a deed conveying lands, by way of mortgage, to the trustees of a charity, is within the Statute of Mortmain (9 *Geo.* 2, c. 36, s. 1), so as to require enrolment in Chancery.

Held, that, at all events, such a deed has not a "condition for the benefit of a grantor," within the meaning of 9 *Geo.* 4, c. 85, s. 1, and therefore, if executed before the passing of that act, is valid without enrolment. *Doe d. Graham v. Hawkins*. 551

NOTARY.

Where a person bound apprentice to a notary, who also carried on the business of an attorney in the same office, three or four years before the expiration of his apprenticeship was articulated also to the same master as attorney, and served under both contracts, the Court *held*, that service under the latter contract was not necessarily inconsistent with the complete service required by the Notaries' Act, under 41 *Geo.* 3, c. 79, s. 7, that it was a question of fact whether the notarial service had been *bonâ fide* performed, and, as it did not appear that the service as attorney's clerk had interfered with the service as notary's apprentice in the particular case, granted a mandamus to the Scriveners' Company to admit the apprentice a notary. *Reg. v. The Scriveners' Company*. 641

NOTICE.

Of dishonour. See BILL OF EXCHANGE, 3.

To quit. See LANDLORD AND TENANT, 4, 5.

To putative father, of application to sessions. See VIII. POOR, 2.

NULLA BONA.

Plea of. See SHERIFF, 2.

OFFICERS.

Of superior Court, sued as trespassers. See TRESPASS.

OVERSEERS.

An order of quarter sessions, on appeal against an account of overseers, is bad, if it does not appear, either by express averment or necessary intendment, to relate to the annual account, for otherwise it may relate to the quarterly account, which the overseers are directed to render by 4 & 5 *Will.* 4, c. 76, s. 47, and in respect of which there is no appeal to the quarter sessions. *Reg. v. Spackman*. 619

OXFORD.

Where the Chancellor's Court of the University of Oxford had proceeded against a party for contumacy, in suing a resident undergraduate in one of the superior courts of Westminster, and had issued a warrant to arrest him for not paying the costs of the proceeding, this court made a rule absolute for a prohibition, without requiring the applicant to declare in prohibition. *Reg. v. Chancellor, &c. of Oxford*. 537

PALACE.

Occupants of Hampton Court Palace liable to poor rate. See I. POOR, 2.

PARISH OFFICERS.

Liability of, for costs of poor rate, appeal. See II. POOR RATE, 1.

PARTICULARS OF DEMAND.

1. The particulars of the plaintiff's demand stated the action to be brought to recover a "sum of 27*l.* 13*s.*, being the balance due after giving credit for all payments on account, and for such sums as the defendant might have to set off against the plaintiff;" the particulars then stated the items of the plaintiff's demand to the amount of 120*l.*:—*Held*, that these particulars did not, within the meaning of the rule of Court, T. T. 1 *Vict.*, give credit for a sum of money admitted to have been paid, or that they did claim a balance within the meaning of the proviso. *Morris v. Jones.* 13
2. The particulars of the plaintiff's demand stated the action to be brought to recover the sum of 29*l.* 1*s.* 1*d.*, after giving credit for the sum of 928*l.* 8*s.* 11*d.* paid at various times. It appeared that the plaintiff had sold and delivered, in the whole, goods to the amount of 949*l.* 10*s.*, but that part, to the amount of 84*l.* 18*s.* had been returned to the plaintiff:—*Held*, that the return did not extinguish ab initio the demand for the goods returned, and that the plaintiff was therefore entitled to recover for the balance above the amount for which credit was given. *Lamb v. Micklewaite.* 136
3. The particulars of the plaintiffs' demand, in an action of assumpsit on a bill of exchange, and for goods sold and delivered, stated goods sold and delivered to the amount of 42*l.* 5*s.*, they then gave credit for a bill of 36*l.* 8*s.*, and to the balance of 5*l.* 17*s.* added a further sum of 10*l.* 18*s.* for goods, and to the amount of the two sums (16*l.* 15*s.*) added, the amount of 36*l.* 8*s.* "for the bill mentioned in the declaration, and indorsed by the defendant."—*Held*, that the defendant could not avail himself of

the transfer of the bill to the plaintiff without an appropriate plea, as the two items in the particulars, with respect to the bill, destroyed each other, so that there was no admission of payment. *Green v. Smithies.* 395

PATENT.

The specification of a patent instrument called the Miners' Safety Fuse, after describing the manner in which the case of the instrument was to be made, proceeded thus, "by means whereof I embrace in the centre of my fuse, in a continuous line throughout its whole length, a small portion or compressed cylinder or rod of gunpowder, or other proper combustible matter prepared in the usual pyrotechnical manner of firework for the discharge of ordnance.

In an action on the case, for infringing the patent, issue was joined on a plea denying that the patentee had by his specification particularly described and ascertained the nature of the invention, and in what manner the same was to be performed.

At the trial it was objected, that the plaintiff had not shewn that any other material but common gunpowder had ever been used in the fuse, or, if introduced, would answer the purpose.

Held, 1. That the question as to the sufficiency of the specification was for the jury.

2. That the language of the specification was not to be astutely construed so as to overthrow the patent, and that it was for the defendant to make out his objection clearly.

3. That the former part of the objection, that any other material but common gunpowder had ever been used in the fuse, was immaterial, because although other materials

not specified, but still within the description given, would answer the purpose, no ambiguity was occasioned, nor was the difficulty of hereafter making the instrument increased by the introduction of the terms which imported that the patentee himself had ever used other materials than gunpowder in the construction of the instrument.
Bickford v. Skewes. 736

PAVING.

Right of paving commissioners as to private street in London. See *HIGHWAY*, 3.

PAYMENT.

How far property in chattel changed, though not paid for to the day.
See *CREDIT*.

Pleading payment. See *PARTICULARS OF DEMAND*—II. *PLEADING*, 6.

PEACE, BREACH OF.

See *CONSTABLE*.

PERFORMANCE.

Of contract. See *VENDOR* and *VENDEE*.

PEW.

See *PROHIBITION*.

PILOT.

Conviction under Pilot act. See *CONVICTION*.

PLEADING.

See *ABUTTALS*.

ALTERATION.

BANKRUPT, 2, 3.

BILL OF EXCHANGE, 1, 2.

CHARTER-PARTY.

CLERGYMAN.

CONSTABLE.

CORPORATION.

COSTS, WHERE SEVERAL COUNTS.

EVIDENCE, 1.

HIGHWAY, 1.

ILLEGALITY.

PARTICULARS OF DEMAND.

SHERIFF, 1, 2.

I. Declaration.

1. *Indebitatus Assumpsit*.

Plaintiff lent defendant money, and received from defendant shares in a company as a security, and agreed to give twenty-one days' notice to defendant before proceeding to compel the repayment of the loan, or of any part thereof, and, upon repayment of any part of the loan, to give back a proportionate amount of shares:—*Held*, that after twenty-one days the plaintiff was not bound to declare specially, averring a tender of the shares, but that he might declare in *indebitatus assumpsit* for money lent.

2. When declaration may be objected to on demurrer to a plea in abatement. *Scott v. Parker*. 258

II. Pleas.

1. *Plea to the Jurisdiction*.

Where a plea is demurred to, which in form is a plea in abatement, but discloses matter that might be pleaded in bar, the defendant may object to the declaration.

The Dundalk Railway Company's Act (1 *Vict.* cap. xcvi.) s. 75, enacts, that it shall be lawful for the directors to recover the amount of calls in any of her majesty's Courts of Record in Dublin, by action of debt, and sect. 77 gives them a general form of declaration, that the defendant is indebted to the Company for calls, whereby an action hath accrued, &c. without setting forth the special matter.

To a declaration in such form the defendant pleaded, "the defendant in his own person comes and says, that this Court ought not to have cognisance of the action," &c.

because it is enacted that it shall be lawful for the Company to sue for calls in any of her Majesty's Courts of Record in Dublin, and he was liable to be sued in those Courts, and not elsewhere, "wherefore he prays judgment, whether this Court can or will take further cognisance of the action."

Held, on demurrer to this plea, that it contained matter in bar, although it was in form a plea to the jurisdiction, and that the defendant was at liberty to impeach the declaration; and that the declaration was bad, as the remedy given by the act had not been adopted, and the Company had no right, at common law, to declare in this form. *The Dundalk Western Railway Company v. Tapster.* 657

2. *Actionem non, &c.*

In debt for 200*l.* for work and labour, money paid, and on an account stated, the defendant pleaded 1*st.* Never indebted; 2*d.* As to 17*l.* 6*s.* 3*d.* parcel &c. a set-off; and 3*dly.* As to 2*l.* 10*s.* other parcel &c. payment:—*Held*, on special demurrer, that the second and third pleas were good, without the allegation of *actionem non*, or prayer of judgment. *Ratton v. Davis.* 21

3. *Duplicity.*

A plea, to an action by a solicitor for work and labour in divers suits, that the plaintiff was not admitted and inrolled, nor qualified or authorised to act as solicitor at the time of the accruing of the cause of action:—*Held* bad, for duplicity, and also on the ground that the plea should have alleged the want of qualification at the time of doing the work, instead of at the time of the cause of action accruing. *Williams v. Jones.* 649

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4. *What Evidence admissible in support of.*

The comprehensiveness of the general issue by statute is not affected by the new rules of pleading. *Ross v. Clifton.* 72

5. Under a plea in detinue, denying the plaintiff's property, a lien may be given in evidence. *Lane v. Tewson.* 584

6. *Payment.*

In a plea of payment, in assumpsit, averring under a *videlicet* that the defendant paid a certain sum in satisfaction &c. the precise sum is immaterial, and he is only bound to prove payment of as much as will cover any demand established against him. *Falcon v. Benn.* 646

7. *Special Set-off.*

See REPLICATION.

III. *Replication de injuriâ.*

1. Plea to an indebitatus count in debt for goods sold and delivered, that plaintiff sold them through *M.*, who at the time of sale was the agent of plaintiff, and intrusted by him with the goods; that *M.*, with the plaintiff's consent, sold the goods as his own, and defendant did not know plaintiff to be the owner, and was willing to allow to plaintiff, by way of set-off, the amount of a debt due from *M.* to defendant at the time of such sale. *Replication de injuriâ.*

Held, in the Queen's Bench, on special demurrer to the replication, that the plea and replication were both good.

Judgment as to the replication reversed in the Exchequer Chamber, because the plea was not in excuse, and also because it set up authority from the plaintiff, and therefore could not be met by *de injuriâ*. *Purchell v. Salter.* 682

IV. *Demurrer, vide supra*, II. 1.

POLICE.

See CERTIORARI, 3—CONSTABLE.

POOR.

I. *Rateability.*

1. By 43 Geo. 3, c. cxl. (an act for improving the port of Bristol), a dock company was formed, with power to convert a portion of a navigable river within the city into a floating harbour, and to make a new course for the river, and a bason to form a passage from the new course into the floating harbour, and to execute divers other works. The port is *entered* in the Bristol Channel, and nearly thirty miles from the parish in which the bason is situate.

By sect. 74 certain dues were payable to the Company for every ship *entering the port*, which dues, after defraying the expenses of repairing the bason and other works, were to be divided among the shareholders of the Company.

By sect. 64, reciting that the lands, which the Company were authorised to take for the execution of the above works, would, during the time the said intended works were carrying on, and for many years afterwards, be rendered unproductive, and be incapable of being rated in aid of the land and parochial taxes, the Company were made chargeable from the time of their taking possession of such lands, with all such land and parochial taxes as the same lands were then or might thereafter be subject to.

Held, that no portion of the dues payable by ships on entering the port was a profit arising from the bason, and that the bason was rateable to the relief of the poor as ordinary land, and not in respect of such dues. *Reg. v. Bristol Dock Company.*

2. Hampton Court Palace has not been personally occupied by the sovereign for about 100 years. It contains state apartments, in which there is a collection of pictures, the property of the crown, and open to public inspection. A guard of honour is always on duty at the palace, and divine service is regularly performed therein by a chaplain appointed by the crown. Sentinels are posted at the various entrances to the palace grounds, and those entrances are opened and closed at the pleasure of the crown. The housekeeper is the only servant of the crown who resides in the palace. Several apartments are occupied by private individuals, but not as annexed to any office under the crown, or in discharge of any service to the crown. These apartments are assigned by the warrant of the Lord Chamberlain, directing the housekeeper to deliver the keys of certain apartments to such persons as by the favour of the crown are allowed to occupy them. Some part of the occupier's family is required by the warrant to reside a part of every year; but no specified term or interest is granted by the warrant. Previously to such persons taking possession, the apartments are put into repair if necessary, at the expense of the crown; afterwards the occupiers themselves have to repair; but all repairs are done under the direction of the crown officers. Many of the apartments so occupied communicate with the state apartments; the doors of communication are kept locked during such occupation, but, if in the general care of the palace, the housekeeper finds it necessary to open those doors, she exercises the power of doing so, and of passing through the apartments so occupied.

Held, that the occupiers of such apartments had such an exclusive

occupation as to render them liable to the poor-rate. *Reg. v. Ponsoby.* 713

II. Poor-rate, Abandonment of.

1. Although parish officers cannot abandon a poor-rate, after it has been allowed and published, so as to render it no longer a subsisting rate, yet they may so far abandon it as to refuse to incur expense in supporting it on appeal; and they have no right, as matter of law, independently of the discretion of the justices, to have the expense of contesting such an appeal allowed them in their accounts. *Reg. v. Fouch.* 585

III. Order of Removal.

1. Single Order for several Paupers.

One order of removal may include two members of a family, although they have independent settlements. *Reg. v. All Saints in Newcastle-upon-Tyne.* 133

2. Supersedeas of.

2. Where parish officers have obtained an order of removal on an insufficient examination, they may procure a supersedeas of the order, although it has been executed by the actual removal of the pauper, and notice of appeal has been given.

After such supersedeas has been served, and all costs have been paid, and the pauper taken back, the parish on which the order was made has no right of appeal.

Where an appeal had been entered against an order, after it had been so superseded, and the sessions decided that they had jurisdiction to entertain the appeal notwithstanding, but afterwards ordered it to be struck out, on the ground that the original order of removal had not been filed with the notice of appeal, as required by a rule of their practice relative to the entry of appeals, a rule for

a mandamus to them to hear the appeal was discharged, because the result at which they had ultimately arrived was right, and this Court would not inquire into their reasons. *The Queen v. West Riding.* 630

3. Order made on hearsay Evidence.

3. An order of removal cannot be made upon hearsay evidence alone. *Reg. v. Ecclesall Bierlow.* 160
4. The following evidence of a pauper, "I was born illegitimate at S.," being necessarily hearsay evidence, is insufficient to sustain an order of removal. *Reg. v. Rishworth.* 597
5. A pauper's statement of what he has heard and believes as to the place of his birth is within the rule excluding hearsay evidence, and insufficient to support an order for his removal.

Where the pauper, who gave such hearsay evidence as to the place of his birth, was stated in the examination to be in gaol for felony, and it was made a ground of appeal, against the order for his removal, that it was not proved upon the oath of any credible witness where or when he was born: —*Held*, that the notice sufficiently pointed to the objection that the evidence itself was hearsay, and was not to be taken as a mere objection to the competency of the witness. *Reg. v. Lydecard St. Lawrence.* 191

IV. Grounds of Removal—Examination.

1. Under 4 & 5 Will. 4, c. 76, s. 81, the grounds of removal must be stated as explicitly as the grounds of appeal.

Under an examination stating generally that the pauper is settled in the appellat parish, the respondents will not be allowed to prove a settlement there by hiring and service. *Reg. v. Eastville.* 150

2. An examination stating "I was

bound apprentice with *J. H.* of &c. but it was agreed in the indenture that I should serve the last forty days of my apprenticeship in *L.* and I served the last forty days in *L.* with *A. H.*"—*Held* insufficient, as a ground of removal under 4 & 5 *Will.* 4, c. 76, because it was not stated that the original master assented to the service with *A. H.* *Reg. v. Lydeard St. Lawrence.* 191

3. It is no objection on appeal against the removal of a pauper that the only witness upon whose examination the order of removal was made was a convicted felon, it not appearing that the justices making the order knew that fact. *Quære*, whether the justices were not bound to make the order on his testimony, unless the incompetency were proved at the time, by production of the record of the judgment against him. *Reg. v. Alternun.* 261

4. *Variance--Order discharged on the Merits.*

Where the sessions have discharged an order of removal, on the ground of a material variance between the settlement stated in the pauper's examination and the settlement proved at the trial, the decision is upon the merits and final, so that a second order of removal cannot be made upon a second examination, stating the facts correctly.

Held, therefore, where an order of removal had been made upon a settlement by renting a tenement, as stated in the pauper's examination, from 1827 to 1828, and the sessions had discharged the order on its appearing that the renting was from 1828 to 1829, that a second order of removal could not be made upon another examination, stating the dates correctly. *Reg. v. Clint.* 245

V. *Grounds of Appeal.*

1. Where the grounds of appeal

against an order of removal set up a subsequent settlement out of the appellant parish, they must state all the essentials of such settlement.

- If, therefore, the settlement is by hiring and service, it must be stated that the hiring was for a year. *Reg. v. North Bovey.* 701
2. The following ground of appeal, against an order of removal, "the said *J. M.* did in the years 1828, &c. rent and occupy for the space of twelve months and upwards a house and land in *P.* (the respondent township), of the yearly rent and value of 10*l.* and upwards, and did pay upwards of 10*l.* rent for the same, and did thereby gain a settlement in the said township:"—*Held*, insufficient, as the words "occupy a house and land," did not necessarily import the residence, which, as being a constituent part of the settlement, ought to have appeared on the notice.

A mandamus to the sessions to hear an appeal must be applied for promptly. *Reg. v. West Riding.* 706

3. *Must be explicit.*

3. A ground of appeal was stated to be that the respondent parish acknowledged the pauper to be an inhabitant of and legally settled in their parish, by relieving him and his family during the last six years out of the parish, and particularly during the years 1839 and 1840, while he and his family resided at Liverpool:—*Held*, to be sufficiently explicit, the facts stated being more within the knowledge of the respondents than of the appellants.

The Court of Queen's Bench will issue a madamus to hear an appeal, if the sessions have refused to hear upon an erroneous decision as to the sufficiency of the grounds of appeal. *Reg. v. Carnarvonshire.* 423

4. The examinations upon which an

order of removal was made, contained (inter alia) the following statement:

"I was overseer of &c., the appellant parish, during the time *J. H.* the father of the pauper's husband, occupied the estate, and I collected the poor-rates of him as the occupier."

The following (inter alia) were the grounds of appeal, "that *J. H.* was not rated, and did not pay rates for the estate; that the examination is informal, and wholly insufficient in law, and bad on the face of it; that the examination does not contain any sufficient evidence of a settlement gained in our said parish by *J. H.*; that the examination does not state in what years *J. H.* occupied &c., or paid rates &c., or that he resided forty days &c."

Held, that the above grounds did not entitle the appellants, at the trial of the appeal, to object that the rate book had not been produced before the removing justices, and that the examination contained no legal evidence that *J. H.* had been rated, because the general objection to the insufficiency of the examination, conveyed no information in itself to the respondents of the ground of appeal intended to be relied on, and was besides preceded by a denial of the fact of rating only, and followed by other specific objections which were equally remote from the point of evidence. *Reg. v. Stapleford Fitzpaine.* 605

5. And give Dates.

5. On an appeal, the statement of the grounds of it gave the name of the master under whom it alleged a subsequent settlement in another parish by hiring and service had been obtained, but omitted to mention the date of the service, and gave no reason for the omission.—

Held, that the statement was therefore insufficient. *Reg. v. Bridgewater.* 265

VI. Settlement.

1. By Estate.

1. Testator devised his real estate to trustees, to sell and divide the proceeds among his nine children, the share of such of his daughters as should be married at his decease to be to their separate use.

The pauper, before testator's death, married one of the daughters, and resided with her in a house, part of the above estate, paying rent weekly to the testator. He resided also two years after testator's death, and before the real estate was sold, paying the rent to the trustees.—*Held* that he gained no settlement. *Reg. v. St. Margaret, Leicester.* 625

2. Extinguishment of.

2. The Poor Law Amendment Act (4 & 5 Will. 4, c. 76, s. 68), extinguishes a settlement "by possession of an estate or interest" on the pauper ceasing to reside within ten miles thereof, and does not merely suspend it.

A settlement claimed under the stat. 13 & 14 Car. 2, c. 12, s. 1, by "coming to settle" on a tenement of the yearly value of 10*l.* in right of the pauper's own estate in it, is a settlement by possession of an estate within the meaning of that act. *Reg. v. St. Giles's in the Fields.* 557

3. Lunatic.

3. A person who inherited a real estate, and thereby acquired a settlement, lived with his mother in a house, part of the estate. He became insane and was removed by his relations to the county asylum, which was more than ten miles from the parish in which the estate was. He was maintained in it, during

four years, partly by his relations and partly from the rents of his estate:—*Held*, that on being removed to the asylum, he, though a lunatic at the time of his removal, had "ceased to inhabit" within the meaning of the stat. 4 & 5 Will. 4, c. 76, s. 68, and had therefore lost his settlement by estate. *Reg. v. Whissendine.* 560

4. By Renting a Tenement.

4. Pauper applied to take a tenement. The owner refused to let unless another person would become joint-tenant with him. On this the two became joint-tenants, at 17l. a year. Pauper entered upon and occupied the tenement exclusively, and paid all the rent for some years:—*Held*, the demise being to him and another, and the rent only 17l. a year, that he had not gained a settlement under 13 & 14 Car. 2, c. 12. *Reg. v. Aberdaron.* 178

5. By Payment of Rates.

5. The 1 Will. 4, c. 18, s. 2, "provided always that, where the yearly rent shall exceed 10l., payment to the amount of 10l. shall be deemed sufficient for gaining a settlement under the said recited act," (6 Geo. 4, c. 57), dispenses with payment of the whole year's rent in settlement by payment of rates as well as in settlement by renting a tenement. *Reg. v. Inhabitants of Brighton.* 54

VII. Chargeability, Admission of.

On the application of the overseers of a parish, two justices made an order on them to remove a pauper lunatic to the County Asylum, under the stat. 9 Geo. 4, c. 40, s. 38. The order, pursuant to the 41st. section of the act, stated that the legal settlement of the pauper was unknown, and directed the expense to be charged to the county.

The overseers obeyed the order, and did not appeal against it. Under the 42d section, two justices afterwards inquired into the place of the last legal settlement of the pauper, and adjudged it to be in the parish the overseers of which had applied for the first order:—*Held*, on the trial of an appeal against such adjudication, that their acts of application for and obedience to the first order, precluded them from saying, that the pauper was not chargeable to their parish at the time when they made their application for it. *Reg. v. Holdsworth.* 442

VIII. Bastardy.

As to non-access. See BASTARDY.

1. What a Bastardy Order by Quarter Sessions must state.

An order of quarter sessions, in a bastardy case, must state that the case has been transmitted from the petty sessions. *Reg. v. Hartley Wintney Union.* 732

2. Notice to putative Father.

A party who appears at the petty sessions on the charge of being putative father, and desires to have his case heard at the quarter sessions, and enters into a recognisance under 2 & 3 Vict. c. 85, s. 3, reciting that he had due notice to appear at the petty sessions, is bound by that recital, and cannot afterwards, on the hearing at the quarter sessions, object that in fact such notice was not given. *Reg. v. Stoddart.* 654

POSTEA.

Entry of damages on, by judge. See MANDAMUS, 3.

POWER OF ATTORNEY.

See STAMP.

PRACTICE.

See AMENDMENT—BANKRUPT, 4—
BAIL—CERTIORARI, 2—CORPORATION, 1—COSTS—EJECTMENT.

PRISONER.

See ARREST—CONVICTION—QUEEN'S
BENCH PRISON—VAGRANT.

PRIVILEGE.

See ARREST—BARRISTER.

As to privilege of witness. See EVIDENCE, 2.

PROBABLE CAUSE.

In an action for a malicious prosecution, though in it the question of reasonable or probable cause depends, not upon a few and simple facts, but upon facts which are numerous and complicated, and upon numerous and complicated inferences to be drawn therefrom, it is the duty of the judge to inform the jury, if they find the facts to be proved, and the inferences to be warranted by such facts, that the same do or do not amount to reasonable or probable cause, so as thereby to leave the question of fact to the jury, and the abstract question of law to the judge. *Panton v. Williams*. 504

PROCESS.

Defective process of inferior court.
See TRESPASS.

PROHIBITION.

See OXFORD.

By a faculty granted in 1758, by the ecclesiastical court of Ely, the Masters of Arts' Pit, and the north and south galleries, in the parish church of St. Mary, Cambridge, were appropriated to the University. In 1819, by agreement with

the then churchwardens, the University, at their sole costs enlarged the Masters of Arts' Pit and the galleries, and erected ten new pews, and for that purpose removed the organ into the tower, and made other alterations; and the University afterwards instituted, by letters of request, a suit in the Court of Arches against the churchwardens and parishioners, to confirm the erections and alterations, and to appropriate the same to the University and their successors exclusively. The official principal received the letters of request and the act on petition, answer, and reply. To a declaration in prohibition by the churchwardens, &c. disclosing these facts, the University demurred, and this Court gave judgment for the defendants in prohibition, on the ground that, supposing the grant of a faculty for a pew to a corporation to be illegal, and that prohibition would lie for a faculty before it is granted (which was doubtful), yet a faculty to confirm erections and alterations would be legal, and the spiritual court had done nothing illegal as yet, and it was not to be presumed that court would not limit the faculty to those objects which might be legally embraced in it. *Hallack v. University of Cambridge*. 100

PROPERTY.

Vesting of. See CREDIT—HERIOT.
Whether any passes under defective distress warrant. See HIGHWAY, 6.
Mode of describing proprietors of railway property. See INQUISTION.

PROVISO.

What interest passes under, in mortgage deeds. See LANDLORD AND TENANT, 5—MORTGAGOR.

PUTATIVE FATHER.

See VIII. POOR, 1, 2.

QUEEN'S BENCH PRISON.

Rule of Court as to.

It is ordered that from henceforth Bethlem Hospital, in the county of Surrey, and also the gardens and grounds belonging to the same, and the roads and approaches leading thereto shall be within and parcel of the rules of the prison of this Court.

557

QUO WARRANTO.

See ALDERMAN.

RAILWAY COMPANY.

See INQUISITION—II. PLEADING, 1.

1. *Ejectment by Mortgagee for Railway.*

By s. 75 of 11 Geo. 4, c. 51, the St. Helen's Railway Company's Act, the Company "may assign and charge the property of the undertaking and the rates and tolls" as a security for money borrowed under the act, and a form of mortgage is there given, assigning "to A. B., his executors, administrators, and assigns, the said undertaking, and all and singular the rates, tolls, and all the estate, right, title, and interest of, in, and to the same:"—*Held*, that a mortgage in the prescribed form did not pass any of the Company's lands. *Doe d. Myatt v. The Saint Helen's and Runcorn Gap Railway Company.*

663

2. *Injuries by Railway to Lands.*

By section 9 of the Eastern Counties Railway Act (6 & 7 Will. 4, cap. cvi), the Company are empowered to raise or lower roads, in order more conveniently to carry the same over or under or by the side

of the railway, making satisfaction "in manner hereinafter mentioned, to all persons, &c. interested in any lands which shall be *taken, used, or injured*, for all damages."

By sect. 28, the owners of lands through which the railway is to be made, may agree to accept satisfaction for the value of such lands, and also compensation for any damage by them sustained by the severing or dividing of such lands, or for any damage sustained by the taking thereof, or by reason of any of the works authorised, and if such parties and the Company shall not agree as to the amount of such purchase-money, satisfaction, or compensation, the same is to be ascertained by a jury, as "*hereinafter is directed.*"

By sect. 29, "for settling all differences which may arise between the said Company and persons interested in any lands which shall or may be *taken, used, damaged, or injuriously affected* by the execution of the act," it is enacted, "that, if any of the parties entitled to receive *such* purchase-money, satisfaction, recompense, or other compensation as aforesaid, shall refuse to accept *such* purchase-money, satisfaction, &c. as shall be offered by the Company," a jury is to be summoned in the manner provided, "and such jury shall inquire of and give a verdict for the sum to be paid for the purchase of *such* land, and also the sum to be paid by way of satisfaction, recompense, &c. either for damages which shall before that time have been done or sustained as aforesaid, or for or by reason of the severing or dividing the same from other lands, whereof any such person as aforesaid shall be seised," &c. "which satisfaction, recompense, &c. for such damage or loss shall be inquired into and assessed *separately from*

the value of the land so to be taken or used as aforesaid."

Held, although the directions by sect. 29, as to the finding by the jury, applied in terms to compensation for such land only as should be "*taken*," and to the ulterior damage consequent upon such taking, yet that the clause extended also to a case where the land of a party had not been "*taken*," but had been "*injuriously affected*" by the lowering of a road in front of such land, the access to which was thereby impeded. *Reg. v. Eastern Counties Railway Company.* 589

3. By 6 *Will.* 4, cap. cxl., s. 93, the Manchester and Leeds Railway Company had a general power to make the railway, and also to divert and sink such roads as they should think proper, subject to the restrictions of the act.

By sect. 38, 7 *Will.* 4, cap. xxiv. (an act enabling them to vary their line), they were authorised to carry the railway over a turnpike road by means of a bridge thirty feet wide, and to lower the turnpike road on each side of the bridge, with a specified inclination, and to give a certain headway underneath, and to relay and reform the road.

The turnpike road, consisting of a carriage way of thirty feet and two paths of six feet each, was forty-two feet wide.

The Company made a bridge of the required width. They also lowered the carriage way of the road, but left the footpaths at their original level.

On the trial of certain traverses to a return to a mandamus, commanding the Company to lower the road to the whole width of forty-two feet and to reform it, the jury found, 1. That the Company had not so lowered the road. 2. That the Company had reformed

the road as directed by the act. 3. That the carriage road and footpaths, as made by the Company, were more commodious to the public, than if the whole road had been lowered to its full width of forty-two feet.

A peremptory mandamus was issued, notwithstanding the finding on the two last issues. *Reg. v. Manchester and Leeds Railway Company.* 338

4. By 6 *Will.* 4, c. xiv., s. 29, the Birmingham and Gloucester Railway Company were authorised, subject to the restrictions of the act, to make across the railway such roads "as they should think proper."

By s. 41, when any part of any road, either public or private, should be cut through, raised, sunk, "*taken*," or so much injured by the Company as to be impassable or inconvenient, the Company, before any such road should be so cut through, raised, &c. were to cause another road to be set out and made instead thereof, as convenient as the said road so cut through, raised, &c., or as near thereto as might be; and where the road cut through, raised, &c. should be a turnpike road, the substituted road, if temporary, was to be set out and made, and the principal road to be restored within six months after commencing the operation.

By s. 47, where any bridge should be erected for carrying any turnpike road, public highway or occupation road over the railway, the road over such bridge was not to be less than fifteen feet.

A mandamus, reciting that the Company had in November, 1838, (after a compulsory power given to the Company of taking land had expired,) cut through and taken part of a turnpike road, which was forty feet wide, and had made a

bridge thereon for carrying it over the railway, the said bridge and the approaches (which were about 150 yards long on either side of the bridge) being about thirty feet wide only, commanded the Company to restore the turnpike road according to the said act.

The Company returned, 1. That they had not "cut through and taken" the said part of the turnpike road within the meaning of the act. 2. That the Company had judged it necessary to erect the bridge to carry the road over the railway, and had made the bridge of a greater width than required by the act. 3. That it was necessary, in consequence of the erection of such bridge, to make approaches also, and that they had made the approaches as convenient to the public as they could be made, in execution of the powers of the act, and as convenient to the public as the original road was. 4. That they were not authorised to injure any house, unless specified in the schedule of the act or omitted by mistake, without consent; that they could not obey the writ without injuring houses neither specified nor omitted by mistake. 5. That they could not obey the writ without taking more land, and that their compulsory power to take land had expired before they were required by the trustees of the road to widen it.

Held, 1. That section 41 was not confined to the case of a turnpike road becoming impassable by the works of the Company, and of a temporary road being substituted during such interruption, and that they had "taken" the road within the meaning of the section.

2. That the return was bad; and a peremptory mandamus was issued, commanding the Company to restore the approaches to their

former width. *Reg. v. Birmingham and Gloucester Railway Company.* 324

RATE.

See CHURCH—MANDAMUS, 2—POOR.

RECOGNISANCE.

See CERTIORARI, 2. And VIII.
POOR, 2.

RECORDER.

Jurisdiction as to costs. See BROUGH, 4.

RE-DEMISE.

Implied in mortgage deed. See LANDLORD AND TENANT—MORTGAGE.

RE. FA. LO.

See REPLEVIN.

REGISTRAR.

Of births. See BIRTHS.

RENT.

Apportionment. See LANDLORD AND TENANT, 1.

REPLEVIN.

It is no breach of a replevin bond conditioned to appear at the next County Court and "then and there to prosecute the suit with effect," that the plaint has been removed by re. fa. lo. and that after the removal the suit abated by the death of the plaintiff in replevin. *Morris v. Matthews.* 677

RESERVATION.

See WAY.

RIGHT OF WAY.

See WAY.

ROAD.

See **HIGHWAY**—**RAILWAY COMPANY**
—**SURVEYOR.**

RULES.

See **JUDGMENT**, as to judge's certificate and signing judgment.
And see **QUEEN'S BENCH PRISON**, as to rules of Queen's Bench Prison.

SALE.

See **CREDIT**—**VENDOR AND VENDEE.**

SCIRE FACIAS.

Arrest in execution of judgment not revived by sci. fa. See **ARREST**.
Amendment of ca. sa. where judgment more than a year old. See **AMENDMENT**.

SCRIVENERS' COMPANY.

See **NOTARY.**

SESSIONS.

See **BOROUGH**, 1, 2, 3—**CERTIORARI**, 1—**HIGHWAY**, 2, 6—**OVERSEERS (ACCOUNTS)**—**POOR**—**SURVEYOR (ACCOUNTS)**.

This Court refused to hear a case sent up by the quarter sessions, which concluded thus—"if the Court of Queen's Bench shall be of opinion, &c. then the order to be confirmed, but, if the Court shall be of a contrary opinion, then the appeal to *stand respited* until the next sessions after the judgment of the Court," because the sessions had at the same time asked this Court to decide the case, and had reserved the power of afterwards deciding it themselves. *Reg. v. Wistow.* 681

SHERIFF.

See **ARREST**—**BARRISTER**—**EJECTMENT**, 3.

1. Execution, without paying Year's Rent.

Under a writ of fieri facias the sheriff levied on and removed goods not the property of the judgment debtor. The owner recovered by action the whole proceeds of the levy. Before the removal of the goods from the premises on which they were, the sheriff had notice of a year's rent being due, which he did not pay:—*Held*, notwithstanding the sheriff had paid the whole proceeds of the levy to the owner of the goods, that he was liable under the stat. 8 Ann. c. 14, s. 1, for removing the goods without paying the rent.

In an action under that statute against a sheriff for removing goods without paying the year's rent due to the landlord, it is no ground for arresting the judgment that the declaration does not shew whose goods the levy was made upon, if it appear that they were on the demised premises. *Forster v. Cookson.* 58

2. Nulla Bona, when a good Return.

Nulla bona is a proper return to a writ of fi. fa., where the sheriff has paid the proceeds of an execution either in discharge of rent under 8 Ann. c. 14, or of a prior writ; and evidence of such payments will support a plea of nulla bona to an action for a false return. *Wintle v. Freeman.* 93

SHIPPING.

See **ADMIRALTY**—**CHARTER PARTY.**

SLANDER.

See **CRIMINAL INFORMATION.**

SPECIAL CASE.

From sessions, how to be stated.
See **SESSIONS.**

STAMP.See **LEASE**.

In proving title in ejectment a deed of conveyance, duly stamped, was produced, which purported to have been executed by power of attorney, but no power of attorney was proved or produced; on the same parchment was a writing bearing a later date, which was a confirmation of the former instrument, and also a substantive conveyance; this instrument was not properly stamped as a conveyance:—*Held*, that an additional conveyance stamp was not necessary. *Doc d. Priest v. Weston.* 582

STATUTE.

Effect of misreciting the title of statute upon a conviction. See **VAGRANT**.

SUPERSEDEAS.

Of order of removal, after removal. See **III. POOR**, 2.

SURVEYOR.

An appeal does not lie to the Court of Quarter Sessions against an allowance of the accounts of the surveyor of the highways by justices at special sessions, under 5 & 6 *Will.* 4, c. 50, s. 44.

Nor will this Court grant a mandamus to the special sessions, after they have once adjudicated and passed the accounts, to require them to re-examine such accounts, although it appears that improper items have been passed, and the justices who passed them admit they did not investigate the case fully, believing that an appeal lay from them to the quarter sessions. *Reg. v. West Riding.* 198

TENDER.

In support of a plea of tender, the evidence of the witness was, "I went to plaintiff, and told him

I came with the amount of *Oliver's* (the defendant's) bill. The plaintiff said he would not take it, it was not his bill. I offered it to him as the amount of his bill."

Held, that this tender was good, and that the plaintiff might have accepted the amount without thereby making any admission that no more was due. *Henwood v. Oliver.* 25

TIME.

Whether the essence of contract. See **CREDIT**.

TOWNSHIP.

Indictment against, for non-repair of road. See **HIGHWAY**, 1.

TRESPASS.

See **JUSTICE—HIGHWAY**, 4—**MORTGAGOR**.

I. Illegal Execution of Process from inferior Court.

The commissioners of a court of requests were empowered to award execution against the person of a party ordered to pay money, and thereupon the clerk of the court, at the prayer of the party prosecuting the order, was to issue a precept by way of ca. sa. to the serjeant of the court, who was thereby authorised to take the debtor. The commissioners were also empowered to order debts to be paid by instalments, and under such terms as appeared to them reasonable, and, on default in paying such instalments, the commissioners *present in court, upon due proof* of such default, were authorised to award execution for the instalment in the same manner as for the debt first decreed.

A party, against whom an order had been made by the commissioners to pay a sum by instalments, neglected to pay an instalment, thereupon, at the request

of the complainant, and without any previous order of the commissioners, but according to the practice of the court, the clerk of the court issued a warrant, under which the serjeant of the court took the debtor.

Held, 1, that the warrant was illegal, as execution had not been awarded by the commissioners present in court upon due proof of the default, and that the clerk who issued the warrant was liable in trespass at the suit of the debtor.

Held, 2, that the serjeant who executed the warrant was protected by the warrant, and was not liable. *Andrews v. Marris*. 268
2. The commissioners of an inferior court, with jurisdiction to try cases of debt where the debtor resided within a certain district, and to award execution against the person, entertained a claim of debt against one who did not reside within their jurisdiction, and issued a warrant against him, under which he was taken in execution by the officer of the court.

In trespass against the plaintiff below, the commissioners, and the officer of the Court.

Held, 1, That the plaintiff below, who had merely stated his case to the court, was not liable.

2. That the commissioners were liable.

3. That the officer, who would generally be protected by a warrant under such circumstances was liable in this case, because the warrant under which he acted did not describe the court by its proper name and style. *Carratt v. Morley*. 275

TROVER.

Sale on credit. See CREDIT.

Conversion. See HERIOT.

TRUSTEES.

Legal Estate. See DEVISE.

VOL. I.—G. D.

TURNPIKE ROAD.

See HIGHWAY—RAILWAY COMPANY, 3, 4,

"UPON."

Signifying "after." See I. PLEADING, 1.

USE AND OCCUPATION.

See DEBT—LANDLORD AND TENANT, 1.

VAGRANT.

In an action against a justice of the peace for a false imprisonment, who justified under a conviction under the Vagrant Act, 5 Geo. 4, c. 88:—*Held*, 1st, that the conviction was not vitiated by the omission of the word "part" before "of Great Britain" in the recital of the title of the statute, as directed in the form given by the act. 2ndly, that pursuing that form it was not necessary to state the evidence on which the conviction proceeded; and 3rdly, that an allegation that the person convicted was of sufficient ability to maintain his family, and did neglect so to do, whereby his wife became chargeable to the parish, was sufficiently certain. *Nixon v. Nanney*. 370

VARIANCE.

Decision upon the merits. See IV. POOR, 4.

VENDOR AND VENDEE.

See CREDIT.

A written contract was entered into for the purchase of "200 or 300" tons of coals, to be sent by the "Navigator or other vessel." The vendor, residing at Stockton-on Tees, on the 31st December, 1838, shipped 127 tons of coals by the George and Henry, and on that day wrote to the vendee at South-

ampton to state what he had done, and that he should draw on him for the amount. The George and Henry was sunk at sea on 6th January, 1839, which fact the vendor, on the 10th January, communicated to the vendee. The vendor's bill was not presented to the vendee until after he knew of the loss, and he then refused to accept it, but he did not by any other act repudiate the contract as performed by the vendor:—*Held*, that his silence, after receiving the vendor's statement of the mode in which he had performed the contract, operated either as an admission by him that the contract was duly performed, or as evidence of acceptance of the substituted performance for that originally contracted for. *Richardson v. Dunn*.
417

VIDELICET.

See II. PLEADING, 6.

VOID.

Whether lease by copyholder without licence to lease. See COPYHOLD, 1.

WAGER.

See HORSE RACE.

WAIVER.

Of strict performance of contract. See VENDOR AND VENDEE.

WALL.

What is boundary wall in covenant to repair. See LANDLORD AND TENANT, 3.

WARRANT.

Of apprehension, on defective information. See JUSTICE.

WATERCOURSE.

Case for obstructing. See CASE.

WAY.

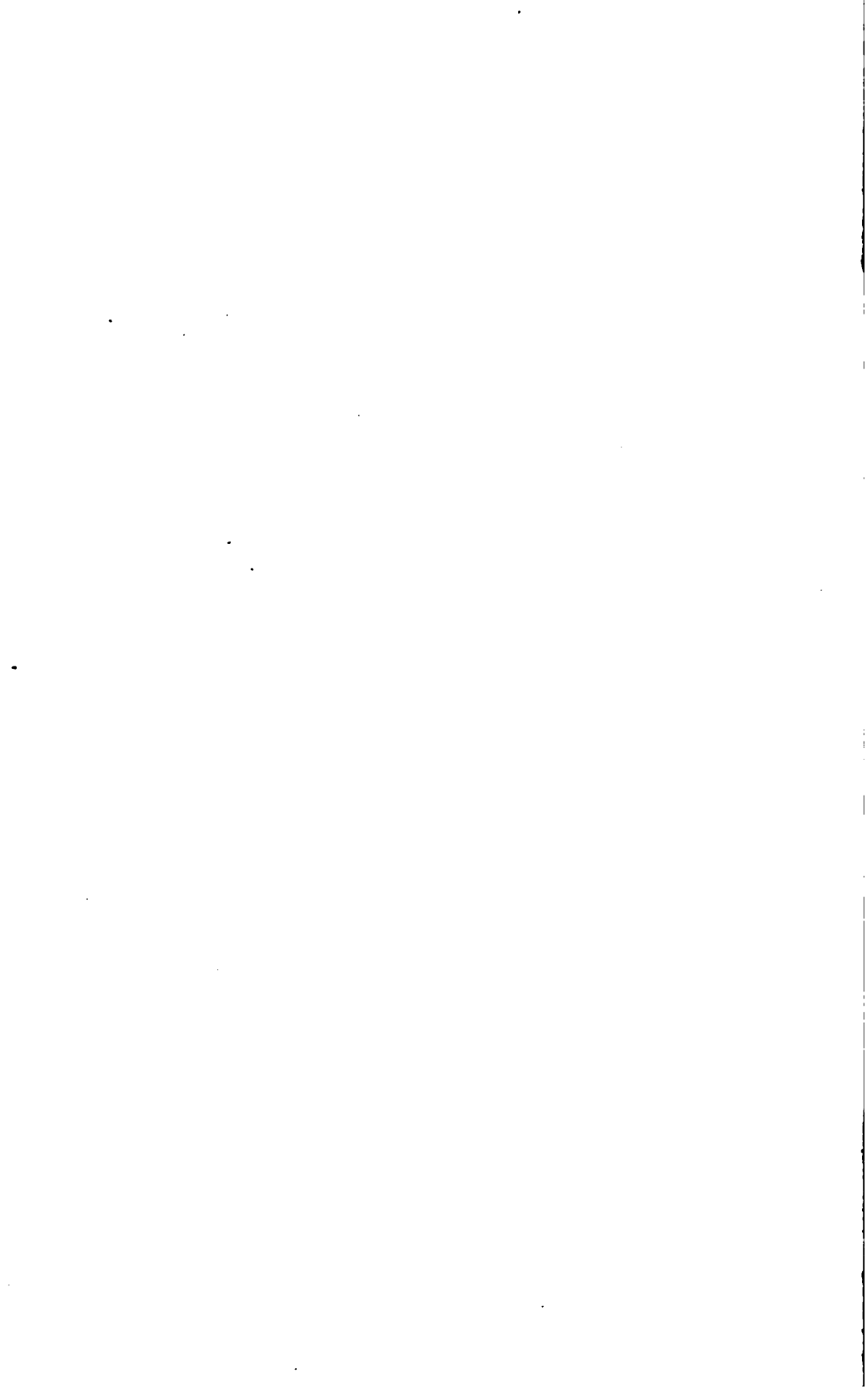
A reservation in a lease of a right of way on foot, and for horses, oxen, cattle and sheep, does not give any right of way to lead manure. *Brunton v. Hall*.
207

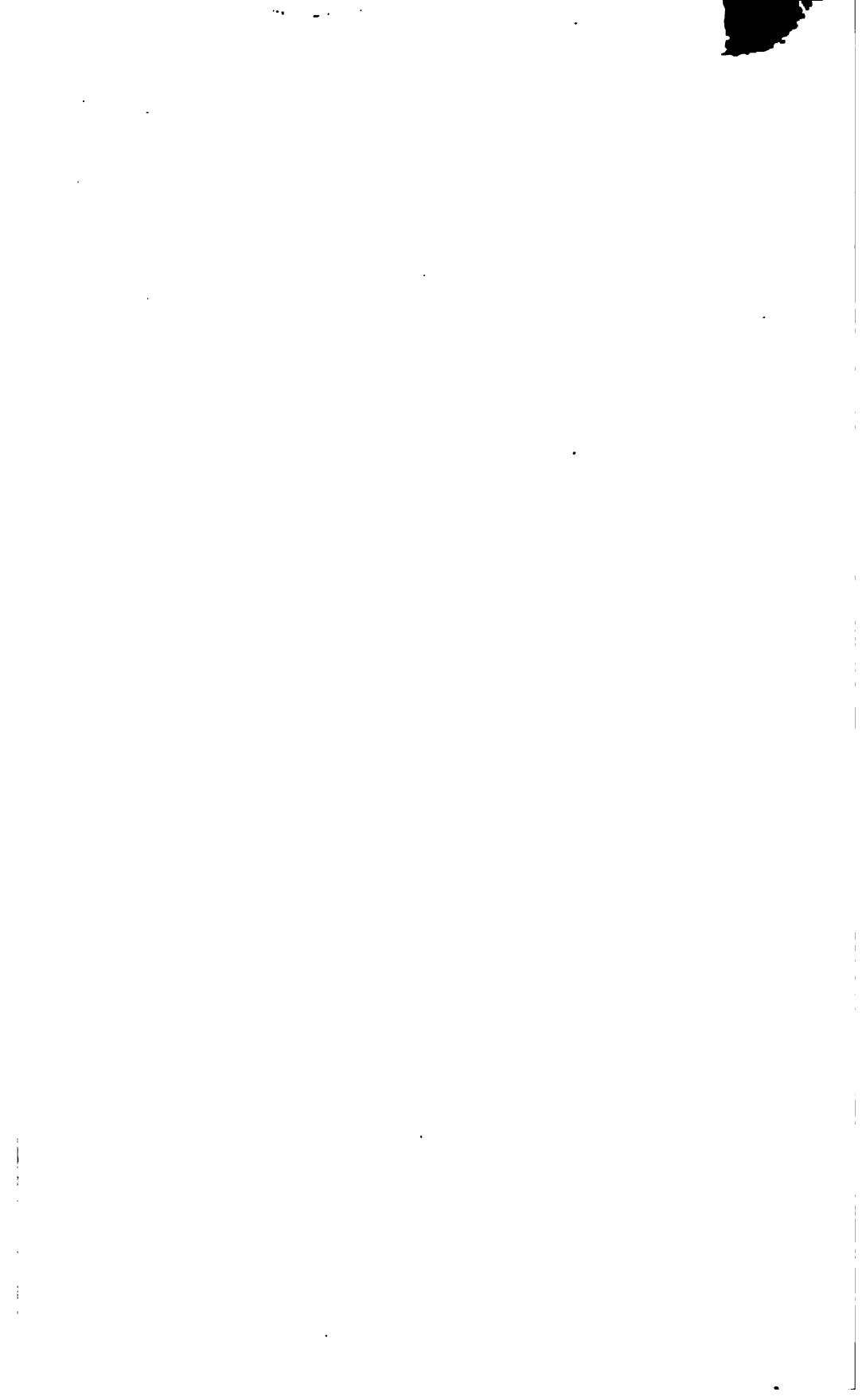
WILL.

See DEVISE.

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